(22,211)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 68.

MANLEY ETTOR AND MARY T. ETTOR, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

CITY OF TACOMA AND CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1912.

1 8379.

Filed Sep. 29, 1909. C. S. Reinhart, Clerk.
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2 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 27359.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants.

Transcript to the Supreme Court.

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3 In the Superior Court of the State of Washington in and for Pierce County.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants.

Amended Complaint.

Comes now the plaintiffs and for their cause of action against the above named defendants, allege as follows:

I.

That the city of Tacoma is a municipal corporation of the first class under the laws of the state of Washington.

II.

That during all the times herein mentioned, the defendant Chicago, Milwaukee & St. Paul Railway Company, was and is a corpora-

tion duly organized and existing under and by virtue of the laws of the state of Washington, and that it has duly complied with all the provisions of the laws of the said state in respect to railway corporations that it is authorized by its articles of incorporation to locate, build, and equip, run and operate a steam railway for the carriage of freight and passengers, extending from convenient points within the cities of Tacoma and Seattle, in said state, in an easterly or southeasterly direction to the eastern boundary line of said state; that it is authorized to acquire land, rights and easements in
4 said state, by purchase or by the exercise of the right of eminent domain, for the use and purposes of the railroad aforesaid; that said defendant had theretofore definitely located and adopted the route of its railway, through the County of Pierce and through Indian Addition hereinafter mentioned, and in the city of Tacoma, and has heretofore acquired land in said city and county and said Indian Addition, for right of way, depot and terminal grounds, to be used in the transaction of its business as a common carrier; that prior to the first day of June, 1906, it was the owner in fee simple of all of blocks 7538, 7540 and 7542, of what was then known as Indian Addition in the county of Pierce, State of Washington, said Indian Addition being unincorporated territory; that said Indian Addition at said time, and all the times prior to the 19th day of August, 1907, was a part of the county of Pierce, in the state of Washington, and was not lawfully a part of any city or said city of Tacoma, Washington, for any purpose whatsoever; that at said time, in said Indian Addition, there was lawfully laid out, dedicated and established and existed, certain highways and streets, among others "M" and "N" streets and 25th and 26th streets, said "M" and "N" streets running parallel with each other and 25th and 26th streets running parallel with each other but in the opposite direction to said "M" and "N" streets and intersecting said "M" and "N" streets at said blocks 7538, 7540 and 7542.

That said defendant as owner in fee of all of said blocks 7538, 7540 and 7542, did on the — day of June, 1906, petition the board of county commissioners of the county of Pierce, for the vacation of all those portions of "M" and "N" streets in said Indian Addition, lying between blocks 7538, 7540 and 7542 aforesaid, and
5 plaintiff attaches hereto a copy of its said petition for vacation, marked Exhibit "A" and made a part of this complaint.

III.

That said railway at said time proposed and since has constructed its road along a line over and across said "M" and "N" streets between 25th and 26th streets and at right angles to said "M" and "N" streets; that the purpose and object of securing the vacation of said "M" and "N" streets by defendant railway company as aforesaid, was to avoid street crossings on said "M" and "N" streets and thus enable said railway company to operate its road when constructed, more advantageously with less expense and less danger to life and property, and also to secure the ground of said street which it proposed to use and which it has since taken possession of as a railroad

right of way; that the vacation sought and requested by said petitioner in his petition was for its sole use and benefit; that at the time off filing said petition, 25th street was a graded street and "M" and "N" streets were graded streets and were then used as a highway or roadway by the public generally and by these plaintiffs. That on the hearing of said petition it was agreed by and between the said county commissioners and the said railway company, that it would vacate said portion of said "M" and "N" streets petitioned for on the conditions named in Exhibit "B" hereinafter referred to; that in pursuance of said petition and said agreement just mentioned, the said board of county commissioners duly authorized by law, acted upon the same and made an order or writing a copy of which order or writing is hereto annexed and marked Exhibit "B" and by such reference is made a part of this complaint; that nothing fur-
6 ther was done by the said board of county commissioners in reference thereto, other than the making of the order or writing above mentioned; that said board of county commissioners never made any order for the construction of any road on South 26th street or plank sidewalk on the side thereof; that said board of county commissioners never furnished to defendant company any plans either proposed by it or approved by it for the construction of said roadway on 26th street; neither did the county surveyor ever furnish the defendant railway company any plans or specifications for the improvement of a roadway on said 26th street; that subsequent thereto and on or about the 19th day of August, 1907, in pursuance of chapter 245 of the laws of 1907, of Washington, said Indian Addition was voted in and duly annexed to the city of Tacoma, by proper ordinance and for the first time belonged to the city as a part thereof; that on said 19th day of August, the said city of Tacoma, a municipal corporation, acquired full jurisdiction and authority over all the streets and alleys in said Indian Addition including 26th street and "M" and "N" streets and took possession of said streets for and on behalf of the public.

IV.

That on or about the — day of May, 1908, the defendant the Chicago, Milwaukee & St. Paul Railway Company, without any order or direction from the board of county commissioners of Pierce county, or the city of Tacoma, commenced to change the surface of said South 26th street between east "L" street and east "P" street in said Indian Addition by making excavations and fills therein, and thereupon notified the city of Tacoma through its commissioner of Public works and city engineer of its intent to grade said
7 streets and change the surface thereof under the purported authority of law and order of the board of county commissioners of Pierce county, heretofore referred to, and thereupon the commissioner of Public Works of the city of Tacoma, the city engineer and the members of the city council of said city of Tacoma, inspected said proposed work and made and directed said changes in the proposed plan for constructing the roadway in said street, in-

creasing the height of the fills and the depth of the cut proposed to be constructed by said railway company and directed that said work be done under the direction of the commissioner of public works and city engineer of said city.

V.

That thereupon and in pursuance to the verbal orders and directions of the commissioner of public works and city engineer of the said city of Tacoma, and with the knowledge, consent and acquiescence of the city council of the said city of Tacoma, and the mayor of said city, the defendant, the Chicago, Milwaukee & St. Paul Railway Company, changed the natural surface and grade of said South 26th street from east "I. street to east "P" street, by constructing a roadway thirty feet in width and in many places, making cuts thirty feet wide and from five to twenty feet deep and in other places making and constructing fills thirty feet wide and from five to ten feet high.

VI.

Plaintiffs allege that no ordinance was ever passed by the city council of the city of Tacoma, establishing a grade on said South 26th street from east "L" street to east "P" street and that said street was not improved and said roadway not constructed in con-
8 formity with any grade established on said street by ordinance of the city of Tacoma, and the city council of the city of Tacoma, did not authorize the grading of said street and the changing of the natural surface thereof by the said railway company by any ordinance or resolution passed by said city council, but all of said work and improvement was done by the said railway company under the unlawful and wrongful oral direction of the commissioner of public works, city engineer and city council of said city of Tacoma, but that said improvement and grading was done by said railway company under a pretense of complying with the provisions of the order of the board of county commissioners of Pierce county, hereinbefore set forth, for the purpose of obtaining possession of the portions of "M and "N" streets sought to be vacated by said board of county commissioners.

VII.

That after said work was completed, the said city of Tacoma, without the passage of any ordinance or resolution, adopted and approved of the work so done by said railway company by accepting the benefits thereof and using said east 26th street as a public street and exercised supervision over said street and used said street for its own purposes and permits the public at large to use the same as a thoroughfare. That said city of Tacoma has treated the said part of said "M" and "N" streets above mentioned and now occupied by defendant railway company as vacated and has permitted the railway company to take possession of it and use it as its own property in consideration of said railway company having constructed and built said roadway on South 26th street between east "L" and east

"P" streets as aforesaid and as soon as the said railway company had constructed said roadway on 26th street and in consideration of its having so constructed said roadway, defendant city surrendered such part of "M" and "N" streets aforesaid to said railway company. That said portions of said "N" and "M" streets are now closed, and the public at large are not permitted to use the same. All of which was done without lawful authority in the premises and to the great injury of these plaintiffs. That the plaintiffs are the owners of the lots hereinafter described and said lots at all times herein mentioned faced upon South 26th street of said roadway on a level with said South 26th street and the owners and tenants had easy and convenient ingress and egress to and from said lots and street.

VIII.

That South 26th street is sixty feet wide and the roadway as constructed, thirty feet wide, is in the center of said street; that the property of the plaintiffs heretofore mentioned and owned by these plaintiffs, is lot eight (8) and nine (9) in block 7639, Indian Addition; that plaintiffs have situated on said property a two-story dwelling house, together with other outbuildings, a portion of which is occupied by plaintiffs and the balance by their tenants; that prior to the construction of said roadway, plaintiffs and their tenants had convenient ingress and egress to and from said lots; that the roadway so constructed has caused an embankment of earth thirty feet wide and nine and one half feet high immediately in front of plaintiffs' property thereby completely shutting off and obstructing plaintiffs' ingress and egress to and from said lots and street, entirely depriving plaintiffs of the use of said street or access thereto or from said property; that said embankment completely obstructs the view from the lower floor of said building, rendering said building and property unsightly and undesirable and greatly depreciating the rental value thereof; that on account of same, plaintiffs' tenants have vacated and removed from said property and plaintiffs have been unable to again rent the same or receive any revenue therefrom; that in order to render the said property of any value or use, it is necessary to fill the same up to grade and in order so to do, it would require a fill of nine and one half feet over the entire property and in order to bring the grade up to the street *and* when so graded, it would be necessary to fill in the space between the lots and the embankment on the street, a space of fifteen feet wide and nine and one half feet high and it will be necessary to obtain permission from the city so to do. That it will also be necessary to raise the house nine and one half feet. That plaintiffs' property is by reason of said acts and things done, greatly depreciated in value.

IX.

That plaintiffs by reason of the acts of defendants hereinbefore set forth, have been greatly damaged in the sum of twenty-five hundred dollars ($2500.00);

Wherefore plaintiffs pray judgment against said defendants and each of them in the sum of twenty-five hundred dollars ($2500.00) together with the costs of this action.

BOYLE, WARBURTON, QUICK & BROCKWAY,
Attorneys for Plaintiffs.

STATE OF WASHINGTON,
County of Pierce, ss:

Stanton Warburton, being first duly sworn on his oath, deposes and says that he is one of the attorneys for the plaintiff in
11 the above entitled action; that he has read the foregoing complaint and knows the contents thereof and believes the same to be true; that the reason that affiant makes this verification, is the fact that all the facts and material allegations of the complaint are within the personal knowledge of affiant.

STANTON WARBURTON.

Subscribed and sworn to before me this 7th day of November, 1908.

JOHN M. BOYLE,
Notary Public.

12 EXHIBIT "A".

To the Board of County Commissioners of Pierce County, State of Washington:

The petition of the Chicago, Milwaukee and St. Paul Railway Company of Washington, states as follows:

1. That it is a corporation duly organized and existing under the laws of the state of Washington and is authorized to locate, construct, maintain and operate a steam railroad for the carriage of freight and passengers from points within the city of Tacoma, to the easterly boundary line of the state of Washington.

2. That said company has located its line of railroad through the county of Pierce and to and within said city of Tacoma, and has acquired the greater portion of its right of way for said line of railroad in said county, and has also acquired lots, blocks, and tracts of land in said city of Tacoma, and adjoining that city, to be used for right of way for main and side tracks, yard and terminal grounds, freight houses, warehouses, and other buildings and structures required for carrying on its business as such common carrier; that its main line of railroad as located and staked out extending from the north line of Pierce county, to the city of Tacoma, crosses the Puyallup river on lot one (1) section ten (10) township twenty (20) north, range three (3) east, W. M., and extends in a westerly direction across Indian tracts two (2) twenty (20) twenty one (21) blocks 7548, 7646, 7645 and to and upon block 7542 all in the Indian Addition to the city of Tacoma; that said company has acquired a right of way across said Indian tracts and said blocks 7548, 7646

and 7645; and has also acquired all of blocks 7542, 7540 and
13 7538 of said Indian Addition, and other property within the city limits of said city of Tacoma, upon which to construct, maintain and operate main and side tracks, warehouses, freight houses, and other buildings and structures to be used in the transaction of its business as a common carrier, and is the owner in fee of all of said blocks 7542, 7340 and 7538; that said railway company desires the vacation of those portions of "M" and "N" streets in said Indian Addition as shown by the plat of said addition on file in the office of the county auditor of Pierce county, and particularly described as follows:

All that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540 produced across said "M" street;

All that portion of "N" street lying between blocks 7540 and 7542 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7540 and 7542, produced across said "N" street, each of the portions of said street so to be vacated being a strip one hundred thirty (130) feet in length and eighty (80) feet in width.

3. Said railway company further states that said vacation is desired for the purpose of constructing, maintaining and operating main and side tracks, yards and terminal grounds, upon, over, and across the portions of said streets hereinbefore described, and for erecting and maintaining freight houses, warehouses and other buildings and structures thereon, or upon parts thereof, all to be used in the transaction of its business as a common carrier;

14 Wherefore, petitioner prays this honorable board that all those portions of said "M" and "N" streets, hereinbefore described, be vacated in the manner provided by law; that this petition be heard and determined at the sitting or session of said board of county commissioners to be held on the 22nd day of June, A. D. 1906, at 10 o'clock A. M., or as soon thereafter as the same may be heard; and that, in the meantime, notice of the pendency of said petition be given, as provided by law.

Dated June 1st, A. D. 1906.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF WASHINGTON,

By H. R. WILLIAMS, *President.*

Attest:

E. W. COOK,

[SEAL.] *Secretary.*

STATE OF WASHINGTON,
County of King, ss:

H. R. Williams, being first duly sworn, deposes and says: that he is the president of the Chicago, Milwaukee and St. Paul Railway

Company of Washington, and makes this verification on its behalf that he has read the foregoing petition and knows the content thereof; and that he believes it to be true.

H. R. WILLIAMS.

Subscribed and sworn to before me this 1st day of June, A. D. 1906.

[SEAL.]

F. M. BARKWILL,
Notary Public in and for the State of Washington, County of King, Residing at Seattle, Therein.

15 EXHIBIT "B".

In the Matter of the Vacation of Portions of "M" and "N" Streets Indian Addition, Pierce County, Washington.

This matter coming on for hearing on this the 13th day of October, A. D. 1906, and it appearing to the board of county commissioners by the records and papers on file herein, that a petition asking for the vacation of parts of certain streets as hereinafter described was filed by the Chicago, Milwaukee and St. Paul Railway Company of Washington, with the said board of county commissioners, and that on the 1st day of June, 1906, notices of the filing of such petitions asking for such vacations were duly posted, all as required by law and the time set for the hearing of said petition to-wit, on the 22nd day of June, 1906;

That on said date said matter was heard, and at said time certain protests and objections to the vacation of said streets was made and filed, and duly considered by the board, and thereafter said matter was continued from time to time.

Now therefore, the said board of county commissioners being fully advised in the premises;

Do hereby order, subject to the terms and conditions hereinafter set forth, that all that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540 produced across said "M" street; and also all that portion of "N" street lying between blocks 7540 and 7542 of said Indian Addition and between the south line of South 25th street and the north line of the

16 alley running east and west along the south side of said blocks 7540 and 7542 produced across said "N" street; each of said portions of said strip being a strip of land one hundred and thirty (130) feet in length and eighty (80) feet in width, all as shown on map or plat of the Indian Addition to the city of Tacoma, filed for record in the office of the auditor of the county of Pierce, on the 1st day of May, 1906, be and the same are hereby vacated and the said strips of land above described, so vacated are hereby attached to the lots, blocks and parcels of land abutting on the said streets so vacated.

This order of vacation is made subject to the following terms and conditions:

I.

That the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall, before this order of vacation becomes operative, at its, or their own expense and without cost or charges to or upon the said county of Pierce, improve South 26th street between east "L" street and Bay street in Indian Addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory roadway thirty feet in width along the center of said South 26th street between said limits, and by laying and constructing a good and sufficient plank sidewalk on one side of said South 26th street as directed by the said board of county commissioners of Pierce county, from said East "L" street to East "P" street, in said Indian Addition.

The work and improvement shall be done upon order of the said board of county commissioners and according to plans prepared or approved by the said board or the county surveyor of said Pierre county, and to the satisfaction and approval of the said board of county commissioners of Pierce county, and shall in any
17 event be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or take exclusive possession of said vacated portions of "M" and "N" street and shall be done within ninety days after being notified by said board to do said work and improve said street.

II.

The said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall pay all damages which the county of Pierce may become liable for resulting to any person, persons, firm or corporation, or property, by reason of such vacation, and the said railway company, its successors and assigns shall forever hold the said county of Pierce, harmless from all such claims and damages.

III.

Upon the failure of the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, with all of the above terms and conditions the said vacations shall become null and void and of no force and effect.

STATE OF WASHINGTON,
County of Pierce, ss:

I, I. M. Howell, county auditor in and for Pierce county, state of Washington, do hereby certify that the foregoing is a full, true and correct copy of an order of the board of county commissioners, dated October 13, A. D. 1906, and can be found in volume 26, p. 409 of the Commissioner's Record.

In witness whereof, I have hereunto set my hand and affixed my official seal this 31st day of October, A. D. 1906.

[SEAL.] I. M. HOWELL,
County Auditor,
By A. J. WEISBACH, *Deputy.*

Filed in Superior Court, Nov. 17, 1908.
J. F. LIBBY, *Clerk,*
By Mc. K., *Deputy.*

18 In the Superior Court of the State of Washington in and for Pierce County.

No. 27359.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY, Defendants.

Answer of C., M. & St. P. Ry. Co. to Amended Complaint.

Division I.

Comes now the defendant Chicago, Milwaukee and St. Paul Railway company of Washington, and for answer to the amended complaint of the plaintiffs filed herein, alleges as follows:

1. Answering paragraphs one and two of said amended complaint, this defendant admits the allegations contained therein.

2. Answering paragraph three of said amended complaint, this defendant states that it admits that on or about the 19th day of August, 1907, Indian Addition was voted in and duly annexed to the city of Tacoma, and for the first time belonged to the city as a part thereof. It denies each and every other allegation contained in said paragraph three.

3. Answering paragraphs four, five and six of said amended complaint, this defendant states that it denies each and every allegation therein contained.

4. Answering paragraph seven thereof, defendants states that it admits that the city of Tacoma adopted and approved of whatever work, if any, was done by said railway company, by accepting the same, and it denies each and every other allegation contained in said paragraph seven.

19 5. Answering paragraph eight, defendant states that it admits that South 26th street is 60 feet wide, and that the roadway constructed and complained of herein is 30 feet wide and in the center of said street. As to whether plaintiffs herein are the owners of the premises described in said paragraph, this defendant states that it has no knowledge or information sufficient to form a belief thereof, and it demands strict proof of said allegation and therefore denies the same. It specifically denies each and every

other allegation contained in said paragraph eight and especially denies that plaintiffs were or are damaged by reason of the acts complained of in their said amended complaint.

Division II.

Further answering said amended complaint and as a complete defense thereto, defendant states that whatever grading was done on 26th street by this defendant, the same was done at the direction, request and for the benefit of and as the agent of the county of Pierce and city of Tacoma, by virtue of the order and contract with said municipalities, Exhibit B attached to said pleading; that whatever injury or damage is now claimed by plaintiffs by reason thereof, the same were wholly released and waived by plaintiffs' grantors, from, by and through whom they derived their title to the lots in question: that the right to construct the roadway at the place and in the manner complained of was, by said plaintiffs' grantors, expressly conferred upon and granted to the said municipalities, and their successors; that plaintiffs purchased said lots with full knowledge of said relinquishment and incumbrance and expressly subject thereto; that, therefore, plaintiffs have no legal right or claim on account of the acts complained of in their amended com-
20 plaint.

Division III.

Further answering said complaint, and as a complete defense thereto, this defendant alleges as follows:

That it is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, and that it has duly complied with all the provisions of the laws of the said state in respect to railway corporation-, that it is authorized by its articles of incorporation to locate, build and equip run and operate a steam railway for the carriage of freight and passengers, extending from convenient points within the cities of Tacoma and Seattle, in said state, in an easterly or southeasterly direction to the eastern boundary line of said state; that it is authorized to acquire land, rights and easements in said state, by purchase or by the exercise of the right of eminent domain for the use and purposes of the railroad aforesaid; that said defendant has heretofore definitely located and adopted the route of its railway, through the county of Pierce and through Indian Addition hereinafter mentioned, and in the city of Tacoma, and has heretofore acquired land in said city and county and said Indian Addition, for right of way, depot and terminal grounds, to be used in the transaction of its business as a common carrier; that prior to the first day of June, 1906, it was the owner in fee simple of all of block 7538, 7540 and 7542, of what was then known as Indian Addition, in the county of Pierce, State of Washington, said Indian Addition, being unincorporated territory; that said Indian Addition at said time, and all the times hereinafter mentioned, was a part of the county of Pierce, in the state of
21 Washington, and was not lawfully a part of any city or said city of Tacoma, Washington, for any purpose whatsoever; that at said time, in said Indian Addition, there was lawfully laid

out, dedicated and established and existed, certain highways and streets, among others, "M" and "N" streets and 25th and 26th streets, said "M" and "N" streets running parallel with each other and 25th and 26th streets running parallel with each other, but in the opposite direction to said "M" and "N" streets and intersecting said "M" and "N" streets at said blocks 7538, 7540 and 7542.

That said defendant as owner in fee of all of said blocks 7538, 7540 and 7542, did on the — day of June, 1906, petition the board of county commissioners of the county of Pierce, for the vacation of all those portions of "M" and "N" streets, in said Indian Addition, lying between blocks 7538, 7540 and 7542 aforesaid, and defendant attaches a copy of its said petition for vacation, marked Exhibit A, and made a part of this answer; that in pursuance of said petition for vacation said county board of commissioners, being duly authorized by law, acted upon the same, granted said petition as prayed, and by written order, entered of record, vacated those portions of "M" and "N" streets, in said Indian Addition as hereinbefore set forth, subject, however, to certain terms and conditions, among which are the following, to-wit:—

"That the said Chicago, Milwaukee and St. Paul Railway Company of Washington, its successors and assigns, shall before this order of vacation becomes operative, at its or their own expense, and without cost or charges to or upon the said county of Pierce, improve said South 26th street between East "L" street and Bay street in Indian Addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory road-way, thirty (30)
22 feet in width, along the center of said South 26th, street, between said limits, and by laying and constructing a good and sufficient plank sidewalk on one side of said South 26th street, as directed by the said board of county commissioners of Pierce county, from said East "L" street to East "P" street in said Indian Addition. The work and improvement shall be done upon order of the said board of county commissioners and according to plans prepared or drawn by the said board or the county surveyor of said Pierce county, and to the satisfaction and approval of the said board of county commissioners of Pierce county, and shall, in any event, be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or take exclusive possession of said vacated portions of "M" and "N" streets, and shall be done within ninety (90) days after being notified by said board to do said work and improve said street."

That defendant attaches hereto, a copy of said written order, entered of record, marked Exhibit B., and made a part of this answer; that defendant duly accepted said order of vacation of said parts of streets, and all the terms, conditions and obligations contained in the same.

That subsequent thereto the objectors, by petition, removed said vacation proceedings to the said superior court, whereon hearing and trial, the said order was by the court adjudged valid and confirmed, and from which judgment no appeal was taken.

That subsequent thereto, and on or about the 19th day of August, 1907, in pursuance of Chapter 245, of the Session Laws of 1907, said

Indian Addition was voted in and duly annexed to the city
23 of Tacoma, and for the first time belonged to a city. That subsequent thereto, and within ninety (90) days after being notified, as provided for in said order, to do said work and improve said street, and on or about the — day of May, 1908, this defendant, in pursuance of the said order, Exhibit B., and by virtue of the authority and right conferred therein upon this defendant, entered upon said 26th street or highway for the sole purpose of carrying out the conditions and terms and agreements contained in said order Exhibit D. That under the provision provided for therein, and according to the directions contained in said order, Exhibit B., said defendant improved, graded and made a satisfactory road-way (30) feet in width, along the center of said 26th street from East "L" street to East "P" street, in said Indian Addition; that the improvement so made, was done with due care and caution and was constructed in accordance with the plans, specifications and directions furnished it by the terms of the said order, Exhibit B; that in making said improvement, this defendant caused no direct injury to the person or property of the plaintiffs; that said improvement was made and done at the sole cost and expense of this defendant and without cost or charge to or upon the county of Pierce or other municipality interested therein; that said defendant has, so far expended on said improvement, and in payment of the consideration of the obligations and agreements contained in said order, Exhibit B., the sum of about six thousand dollars ($6,000.00); that whatever grading and improvement was done on said 26th street by this defendant, and complained of by the plaintiffs, the same was done for and on behalf of the municipality interested, and in pursuance of the lawful
24 authority and the binding obligations of the county of Pierce and the city of Tacoma, with this defendant, as contained in said order, and with the full knowledge, consent and directions of said municipalities, and the subsequent direction and authority of the city of Tacoma in the exercise of its power of control over its streets and highways, conferred upon it by statute; that said improvement so made, and all the acts of this defendant in connection therewith, were subsequently, with full knowledge thereof, ratified, accepted and acknowledged by the municipalities concerned therein. That whatever other binding obligations are contained in said order, Exhibit B., and not now filfilled, said defendant alleges that it is ever ready, able and willing to perform, whenever said municipalities direct and order the same to be performed.

That by reason of the premises, this defendant states that it is not liable for the alleged injury, if any, complained of in their complaint, and it therefore prays that it be dismissed and go hence at the cost of said plaintiffs.

GEO. W. KORTE.
H. S. GRIGGS.
Attorneys for Defendant, Chicago, Milwaukee and St. Paul Railway Company of Washington.

STATE OF WASHINGTON,
County of King, ss:

I, E. W. Cook, being first duly sworn on oath, deposes and say: that I am the secretary of the defendant Chicago, Milwaukee and St. Paul Railway Company, of Washington, that I have read the foregoing answer, know its contents, and the allegations therein contained are true, as I verily believe.

E. W. COOK.

25 Sworn to before me and subscribed in my presence by the said E. W. Cook, this 30th day of November, A. D. 1908.

[NOTARIAL SEAL.] F. M. BARKWILL,
Notary Public in and for King County, Washington,
Residing at Seattle, Therein.

26 EXHIBIT "A."

To the Board of County Commissioners of Pierce County, State of Washington:

The petition of the Chicago, Milwaukee and St. Paul Railway Company, of Washington, states as follows:

1. That it is a corporation duly organized and existing under the laws of the state of Washington, and is authorized to locate, construct, maintain and operate a steam railroad for the carriage of freight and passengers from points within the city of Tacoma, to the easterly boundary line of the state of Washington.

2. That said company has located its line of railroad through the county of Pierce, and to and within said City of Tacoma, and has acquired the greater portion of its right of way for said line of railroad in said county, and has also acquired lots, blocks and tracts of land in said city of Tacoma, and adjoining that city, to be used for right of way for main and side tracks, yard and terminal grounds, freight houses, warehouses, and other buildings and structures required for carrying on its business as such common carrier; that its main line of railroad as located and staked out, extending from the north line of Pierce county, to the city of Tacoma, crosses the Puyallup river on lot one (1) section ten (10) township twenty (20) north range three (3) east, W. M., and extends in a westerly direction across Indian tracts two (2) twenty (20), twenty-one (21), blocks 7548, 7646, 7645 and to and upon block 7542 all in the Indian addition to the city of Tacoma; that said company has acquired a right of way across said Indian tracts and said blocks 7548, 7646 and 7645 and has also acquired all of blocks 7542, 7540 and 7538 of said Indian addition, and

27 other property within the city limits of said city of Tacoma, upon which to construct, maintain and operate main and side tracks, warehouses, freight houses, and other buildings and structures to be used in the transaction of its business as a common carrier, and is the owner in fee of all of said blocks 7542, 7340

and 7538; that said railway company desires the vacation of those portions of "M" and "N" streets in said Indian addition, as shown by the plat of said addition on file in the office of the county auditor of Pierce county, and particularly described as follows:—

All that portion of "M" street lying between blocks 7538 and 7540 of said Indian addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540, produced across said "M" street.

All that portion of "N" street lying between blocks 7540 and 7542 of said Indian addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7540 and 7542, produced across said "N" street, each of the portions of said streets so to be vacated, being a strip one hundred thirty (130) feet in length and eighty (80) feet in width.

3. Said railway company further states that said vacation is desired for the purpose of constructing, maintaining and operating main and side tracks, yards and terminal grounds, upon, over and across the portions of said streets hereinbefore described, and for erecting and maintaining freight houses, warehouses and other buildings and structures thereon, or upon parts thereof,
28 all to be used in the transaction of its business as a common carrier;

Wherefore, petitioner prays this honorable board that all those portions of said "M" and "N" streets, hereinbefore described, be vacated in the manner provided by law; that this petition be heard and determined at the sitting or session of said board of county commissioners to be held on the 22nd day of June, A. D. 1906, at 10 o'clock A. M., or as soon thereafter as the same may be heard; and that, in the meantime, notice of the pendency of said petition be given, as provided by law.

Dated June 1st, A. D. 1906.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF WASHINGTON.
By H. R. WILLIAMS, *President.*

Attest:

[SEAL.] E. M. COOK, *Secretary.*

STATE OF WASHINGTON,
County of King, ss:

H. R. Williams, being first duly sworn, deposes and says; that he is the president of the Chicago, Milwaukee and St. Paul Railway Company, of Washington, and makes this verification on its behalf; that he has read the foregoing petition and knows the contents thereof; and that he believes it to be true.

H. R. WILLIAMS.

Subscribed and sworn to before me this 1st day of June, A. D. 1906.

[SEAL.] F. M. BARKWILL,
Notary Public in and for the State of Washington, County of King, Residing at Seattle, Therein.

29 EXHIBIT "B."

In the Matter of the Vacation of Portions of "M" and "N" Streets, Indian Addition, Pierce County, Washington.

This matter coming on for hearing on this the 13th day of October, A. D. 1906, and it appearing to the board of county commissioners by the records and papers on file herein, that a petition asking for the vacation of parts of certain streets as hereinafter described was filed by the Chicago, Milwaukee and St. Paul Railway Company of Washington, with the said board of county commissioners, and that on the 1st day of June, 1906, notices of the filing of such petitions asking for such vacations were duly posted, all as required by law, and the time set for the hearing of said petition, to-wit:—on the 22nd day of June, 1906;

That on said date said matter was heard, and at said time certain protests and objections to the vacation of said streets was made and filed, and duly considered by the board, and thereafter said matter was continued from time to time.

Now therefore, the said board of county commissioners being fully advised in the premises,

Do hereby order, subject to the terms and conditions hereinafter set forth, that all that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540, produced across said "M" street; and also all that portion of "N" street lying between blocks 7540 and 7542 of said Indian addition and between the south line of South 25th street and the north line of the alley running east, and west along the south side
30 of said blocks 7540 and 7542, produced across said "N" street; each of said portions of said strip being a strip of land one hundred and thirty (130) feet in length and eighty (80) feet in width, all as shown on map or plat of the Indian Addition to the city of Tacoma, filed for record in the office of the auditor of the county of Pierce, on the 1st day of May, 1906, be and the same are hereby vacated, and the said strips of land above described so vacated are hereby attached to the lots, blocks and parcels of land abutting on the said streets so vacated.

This order of vacation is made subject to the following terms and conditions:

I.

That the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall, before this order of vacation

becomes operative, at its, or their own expense and without cost or charges to or upon the said county of Pierce, improve South 26th street between East "L" street and Bay street, in Indian Addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory roadway thirty feet in width along the center of said South 26th street between said limits, and by laying and constructing a good and sufficient plank sidewalk on one side of said South 26th street as directed by the said board of county commissioners of Pierce county, from said East "L" street to East "P" street, in said Indian Addition.

The work and improvement shall be done upon order of the said board of county commissioners and according to plans prepared or approved by the said board *of* the county surveyor of said Pierce county, and to the satisfaction and approval of the
31 said board of county commissioners of Pierce county, and shall in any event be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or take exclusive possession of said vacated portions of "M" and "N" streets, and shall be done within ninety days after being notified by said board to do said work and improve said street.

II.

The said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall pay all damages which the county of Pierce may become liable for resulting to any person, persons, firm or corporation, or property, by reason of such vacation, and the said railway company, its successors and assigns, shall forever hold the said county of Pierce harmless from all such claims and damages.

III.

Upon the failure of the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, to comply with all of the above terms and conditions the said vacations shall become null and void and of no force and effect.

STATE OF WASHINGTON,
County of Pierce, ss:

I, I. M. Howell, County auditor, in and for Pierce county, State of Washington, do hereby certify that the foregoing is a full, true and correct copy of an order of the board of county commissioners, dated October 13, A. D. 1906, and can be found in volume 26, p. 409, of the Commissioners' Record.

In witness whereof, I have hereunto set my hand and
32 affixed my official seal this 31st day of October, A. D. 1906.

[SEAL.] I. M. HOWELL,
County Auditor,
By A. J. WEISBACH, *Deputy.*

Filed in Superior Court Dec. 4, 1908.
J. F. LIBBY, *Clerk,*
By McK., *Deputy.*

3—68

A true copy of the within answer received and due service of same acknowledged this December 14, 1908.

BOYLE, WARBURTON, QUICK & BROCKWAY, *Attorney- for Pl'ffs.*

33 In the Superior Court of the State of Washington in and for Pierce County.

No. 27359.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY, Defendants.

Answer.

Comes now the defendant, City of Tacoma, and for its answer to the amended complaint of the plaintiffs herein, alleges as follows:

I.

For answer to paragraph 2 of plaintiffs' complaint, this defendant admits that the Chicago, Milwaukee and St. Paul Railway Company, is a corporation. Admits that the said Indian Addition at said time, and at all times prior to the 19th day of August, 1907, was a part of Pierce county, in the state of Washington, and not a part of the city of Tacoma; and that said Indian Addition was lawfully laid out and established with certain streets and highways as alleged. That as to each and every other allegation, matter and thing contained in the said paragraph not specifically admitted herein, this defendant alleges that it possessed no information sufficient to form a belief, and therefore denies each and every such allegation, matter and thing.

II.

For answer to paragraph 3, this defendant admits that
34 South 25th street, "M" and "N" streets are graded streets used as roadways by the public generally, and admits that on the 19th day of August, 1907, the Indian Addition was voted in and duly annexed to and became a part of the city of Tacoma, by a proper ordinance, and the said city acquired jurisdiction over the streets and alleys in the said addition; and as to each and every other allegation, matter and thing contained in the said paragraph, not specifically admitted herein, defendant alleges that it possessed no information sufficient to form a belief, and therefore denies each and very such allegation, matter and thing.

III.

Answering paragraph 4, this defendant admits that whatever was done by the Chicago, Milwaukee and St. Paul Railway Company

was done without order or direction from the city of Tacoma. It denies that the city of Tacoma was notified through its commissioner of public works and city engineer, or at all, of any intention to change the surface of any of said streets. It denies that the commissioner of Public works, the city engineer and members of the city council, or any of them, inspected the said proposed work or directed any changes in the proposed plan; and denies that the said parties, or any of them, directed that the said work should be done under the direction of the commissioner of public works, and the city engineer of the said city, and alleges that the said parties or either of them, had no power to give or make such order to bind the city of Tacoma, in the manner therein set forth. And further alleges that as to each and every other allegation, matter and thing contained in the said paragraph not specifically admitted or
35 denied, the defendant possessed no information sufficient to form a belief, and therefore denies each and every such allegation, matter and thing.

IV.

For answer to paragraph 5, this defendant admits that the Chicago, Milwaukee and St. Paul Railway Company, changed the natural surface of the ground on said South 26th street from East "L" street to East "P" street, and denies each and every other allegation, matter and thing therein contained.

V.

For answer to paragraph 6, this defendant admits that no order was ever passed by the city council of the city of Tacoma, establishing a grade on South 26th street from East "L" street, to East "P" street, and that said street was not improved and said roadway was not constructed in conformity with any grade established on the said street by ordinance of the city of Tacoma or otherwise; and that the city council of the city of Tacoma did not authorize the grading or changing of the natural surface of the said street by the said railway company by any order or resolution passed by the said city council, and denies that all of the said work, or any of it, was done under the oral directions of the commissioner of public works, city engineer and city council of the city of Tacoma. And alleges that as to each and every other allegation, matter and thing contained in the said paragraph, not specifically admitted or denied, the defendant possesses no information sufficient to form a belief and therefore denies each and every such allegation matter and thing.

VI.

Answering paragraph 7, this defendant admits that no resolution or ordinance was passed or adopted by the city council of
36 the city of Tacoma with relation to the said work after the same was completed or at all, and denies each and every other allegation, matter and thing contained in the said paragraph.

VII.

For answer to paragraph 8, this defendant admits that South 26th street is sixty feet wide. It denies that plaintiffs have been damaged in any sum whatsoever, and alleges that as to each and every other allegation, matter and thing contained in the said paragraph it has no information sufficient to form a belief and therefore denies each and every such allegation, matter and thing.

And for its Further Answer and Affirmative Defense this Defendant alleges as follows:

I.

That the said Indian Addition was at all times prior to the 1st day of May, 1896, a part of the Puyallup Indian Reservation, the title to which was held in trust by the United States for the Puyallup Indians, and as so held was wholly under the supervision, management and control of the United States, and subject to all its laws. That while the land comprising the said Indian Addition was so under the supervsion, management and control of the United States, and prior to the said 1st day of May, 1896, the United States acting by and through its commissioners, agents, servants and employes, J. J. Anderson, John W. Renfrew and Ross J. Alexander, caused the same to be platted and laid out as such Indian Addition, pursuant to an act of Congress approved March 3rd, 1893, and in conformity with the streets, alleys and plats in that portion of the city of Tacoma, adjoining the lands of the said Indian Addition and
37 by and through its said commissioners, agents, servants and employés caused the said Indian Addition to be dedicated to the public on the said 1st day of May, 1896; dedicating all streets and alleys in the said Indian addition including the said South 26th street, to the public without reservation.

II.

That as to all of the things done with relation to platting, laying out and dedicating the said Indian Addition, as heretofore set forth, the same was done by the United States under and by virtue of its laws; and the said dedication of the said Indian Addition was, and at all times since has been and now is, a valid and binding contract between the United States as the dedicator of said addition, and the public; and plaintiffs herein and all grantees of property in said Indian Addition subsequent to the said dedication were and at all times since the said dedication have been and now are subject to the laws of the United States in force at the time of the dedication, with relation to any right to damage for the establishment of any original street grade in the said Indian Addition, and the grading of said street to such original grade. And at the time of such dedication there was no law of the United States, nor of the state of Washington, under or by virtue of which plaintiffs, or any grantee of the dedicator, would be entitled to damages for an original street grade such as *it* set forth in plaintiff's complaint, where such grade so es-

tablished is a fair and reasonable grade under all of the circumstances and conditions of the making and establishing of such grade.

III.

38 That the grade established on the street in question was an original grade and was established solely with relation to the making of a street for practicable use and purposes—a part of the said street being on a hill and a part running over low, swampy ground, necessitating cuts in some places and fills in other places, but that said grade so established as a whole was a fair and reasonable grade under all of the facts, circumstances and conditions surrounding and with relation to the lay of the land in question.

Wherefore, defendant having fully answered plaintiffs' amended complaint herein, prays that the plaintiffs take nothing by this their action, and that the defendant have judgment for its costs and disbursements herein.

T. L. STILES,
City Attorney.
F. R. BAKER,
F. A. LATCHAM,
Ass't City Attorneys.

STATE OF WASHINGTON,
County of Pierce, ss:

John W. Linck, being first duly sworn on oath says: That he is the duly elected, qualified and acting mayor of the city of Tacoma, one of the defendants herein, and as such is authorized by law to verify pleadings on behalf of said city that he has read and knows the contents of the foregoing answer and that the statements and allegations therein contained are true as he verily believes.

JOHN W. LINCK.

Subscribed and sworn to before me this 11th day of December, A. D. 1908.

39 F. A. LATCHAM,
Notary Public in and for the State of Washington, Residing at Tacoma, Pierce County.

Service of within answer by copy, admitted this 15" day of Dec., 1908.

BOYLE, WARBURTON, QUICK AND BROCKWAY,
Att'y- for Pl't'ffs.

Filed in Superior Court Mar. 3, 1909.
J. F. LIBBY, *Clerk,*
By McK., *Deputy.*

40 In the Superior Court of the State of Washington in and for Pierce County.

No. 27359.

MANLEY ETTOR and MARY T. ETTOR, Plaintiffs,
vs.
CITY OF TACOMA et al., Defendants.

Reply.

Reply to Answer of Defendant City of Tacoma.

I.

In reply to the allegations contained in paragraph II of defendant city's first affirmative defense, plaintiffs admit that said Indian Addition was platted and its streets and alleys dedicated to the use of the public by the United States, but they deny each and every other allegation therein contained. Further answering the allegations contained in said paragraph, they allege that it was in contemplation by the United States at the time the addition was platted and also by the plaintiffs at the time they purchased the property, that in a short time, said Indian Addition would be voted in and taken in as a part of the city of Tacoma, and that when this should be accomplished and done, the manner of improving the streets the liabilities and obligations of both the property owners and the city of Tacoma, would be determined and controlled by the laws then in force, relating to the improvement of streets and alleys of cities of the first class within the state of Washington.

II.

Replying to paragraph III of said affirmative defense, Plaintiffs deny that the grade as constructed, was an original grade
41 or was established in conformity with the laws of the state of Washington, and the city of Tacoma, and deny that the same was a fair and reasonable grade.

Reply to Answer of Defendant C., M. & St. P. Ry. Co.

I.

Plaintiffs in reply to division II of the answer of defendant Ry. Co., deny that plaintiffs' grantors released any right to claim damage by reason of improving the street in front of them or that their grantors conferred upon the municipalities any right to improve the street except in accordance with the laws in force at the time the improvement should be made. Plaintiffs allege that all the property facing on 26th street between east "L" and east "P" streets except that contained in Indian Addition, was at all times mentioned in the complaint and answer in this cause, within the corporate limits of the city of Tacoma.

II.

In reply to allegations contained in Ry. Co.'s answer Division II plaintiffs deny they have any knowledge or information sufficient to form a belief as to the allegations contained in the last four lines on page five. Plaintiffs deny that defendant Ry. Co., improved said 26th str. according to the directions contained in said order, being exhibit "B" of its answer, or that it improved, graded and made a practical roadway along said street. They deny that in making said improvement, it caused no direct injury to the property of these plaintiffs and deny that said work was done in pursuance of any lawful authority either conferred upon it by the county of Pierce, or city of Tacoma, and deny that they have any knowledge or information sufficient to form a belief as to what sum of money
42 defendant may have expended in the improvement of said street. Plaintiffs further deny that defendant is not liable for the injury they sustained by reason of the improvement of said street.

Wherefore plaintiffs pray for judgment as demanded in the complaint herein.

BOYLE, WARBURTON, QUICK & BROCKWAY,
Attorneys for Plaintiffs.

STATE OF WASHINGTON,
County of Pierce, ss:

S. Warburton, being first duly sworn on oath, deposes and says: that he is one of the attorneys for the plaintiffs in the above entitled action; that he has read the foregoing reply, knows the contents thereof and believes the same to be true; that the reason affiant makes this verification is the fact that all the facts and material allegations of the reply are within the personal knowledge of affiant.

S. WARBURTON.

Subscribed and sworn to before us, this 17th day of December, 1908.

JOHN M. BOYLE,
Notary Public.

Filed in Superior Court, Dec. 22, 1908.
J. F. LIBBY, *Clerk,*
By R. E. McF., *Deputy.*

43 In the Superior Court of the State of Washington in and for Pierce County.

No. 27359.

MANLEY ETTOR and Wife, Plaintiffs,
vs.
CITY OF TACOMA and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendants.

Cost Bill.

Comes now the defendant, Chicago, Milwaukee & St. Paul Railway Company of Washington, and files herewith its cost-bill herein, as follows:

E. B. Crane, 3 days at $2. per day and 20 cents mileage each day	$6.60
Wilson, 3 days at $2. per day and 20 cents mileage each day.	$6.60
Attorney fee	15.00
	$28.20

GEO. W. KORTE AND
H. S. GRIGGS,
Attorneys for Defendant Chicago, Milwaukee & St. Paul Railway Company of Washington.

Entered Ex. Doc. No. 23, Page 444.

Received copy of within cost-bill this 17th day of April, 1909.
BOYLE, WARBURTON & BROCKWAY,
Att'ys for Plaintiffs.

Filed in Superior Court, Apr- 17, 1909.
J. F. LIBBY, *Clerk,*
By McK., *Deputy.*

44 No. 27359.

MANLEY ETTOR et al.
vs.
CITY OF TACOMA.

Judgment Debtor—Manley Ettor and Mary T. Ettor, his wife.
Judgment Creditor, City of Tacoma & the Chicago, Milwaukee & St. Paul Railway.

	Dr.	Cr.
Judgment—Costs, with interest at 6 per cent per annum from date and costs C. M. & St. P. Ry...	28.20	
Attorney'- fee (Sta. Fees) 2 App. 4 & Judg't 6...	10.00	
Defendant's costs Witness fee $13.20		
Attorney's fee $15.		

Judgment entered Dept. 3, Journal 118, Page 489, Apr. 8-1909.

45 In the Superior Court of the State of Washington in and for Pierce County.

No. 27359.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants.

Judgment.

The above entitled action having come on regularly for trial before the above named court on the 11th and 12th days of March, 1909, upon the amended complaint of the plaintiffs the answers of the defendants and the plaintiffs' replies. Present Messrs. Boyle, Warburton, Quick and Brockway, attorneys for plaintiffs, and T. L. Stiles, City Attorney of the city of Tacoma, and Messrs. Korte and Griggs, attorneys for the Chicago, Milwaukee and St. Paul Railway; thereupon a jury of twelve men was duly drawn and sworn to try the cause.

And thereupon, the plaintiffs in support of their action produced and examined witnesses and introduced certain documentary evidence, and rested.

And thereupon, the defendants and each of them, moved that the court non-suit the plaintiffs upon the ground that the evidence submitted was insufficient to support the cause of action alleged in the complaint, or any cause of action against the said defendants or either of them.

And thereupon, the court, after hearing the arguments of counsel upon said motions, and after due consideration of the
46 same granted the said motions.

Wherefore, by reason of the law and the premises, it is by the court,

Ordered and adjudged that the plaintiffs take nothing by their action herein against the said defendants herein, or either of them; that the action be dismissed, and that the defendants, city of Tacoma and the Chicago, Milwaukee and St. Paul Railway, have and recover from the plaintiffs, Manley Ettor and Mary T. Ettor, his wife, their costs and disbursements herein to be taxed by the clerk.

W. O. CHAPMAN, *Judge.*

Entered Ex. Doc. No. 23, Page 444.
Entered Jour. 118, Dept. 3, Page 489—Apr. 8* 1909.

Service of within by copy, admitted this 8th day of Apr. 1909.
BOYLE, WARBURTON & BROCKWAY,
Atty for —.

Filed in Superior Court, Apr. 8, 1909.
J. F. LIBBY, *Clerk,*
By McK., *Deputy.*

4—68

47 In the Superior Court of the State of Washington in and for Pierce County.

No. 27359.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
THE CITY OF TACOMA, a Municipal Corporation, and Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Defendants.

Notice of Appeal.

To the Above-named City of Tacoma, a Municipal Corporation, and Its Attorneys, T. L. Stiles, Frank R. Baker, and Frank Latcham, and to the Above-named Defendant, the Chicago, Milwaukee & St. Paul Railway Company, and Its Attorneys, H. S. Griggs and Geo. W. Korte:—

You and each of you will please take notice, that the above named plaintiffs Manley Ettor and Mary T. Ettor, his wife, appeal to the Supreme Court of the state of Washington, from that certain judgment of the superior court of the state of Washington, in and for Pierce county, in favor of the above named defendants and against the above named plaintiffs entered in the above entitled cause on or about the 8th day of April, 1909, said judgment being a judgment of dismissal and for costs.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Plaintiffs.

48 Service of the within admitted this 17 day of June, 1909.

H. S. GRIGGS,
Att'y for C., Mil. & St. P. Ry., etc.
T. L. STILES,
City Att'y for City of Tacoma.

Ent. J. 120, page 520, June 21, 1909.
Entered Ex. Doc. No. 23, page 444.
Filed in Superior Court Jun- 21, 1909.
J. F. LIBBY, *Clerk,*
By McK., *Deputy.*

49 In the Superior Court of the State of Washington in and for Pierce County.

No. 27359.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
THE CITY OF TACOMA, a Municipal Corporation, and Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Defendants.

Appeal Bond.

Know all men by these presents, that we Manley Ettor and Mary T. Ettor, his wife, as principals, and the United Surety Company, a corporation, authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto the above named defendants, the Chicago, Milwaukee & St. Paul Railway Company, a corporation and the city of Tacoma, a municipal corporation, and each of them in the full sum of four hundred dollars ($400.00) lawful money of the United States of America to be paid to the said City of Tacoma, and the Chicago, Milwaukee & St. Paul Railway Company, for which payment well and truly to be made, we bind ourselves and each of us, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 21 day of June, 1909. The condition of this obligation is such, that whereas in an action pending in the superior court of the state of Washington, in and for Pierce county, entitled Manley Ettor and Mary T. Ettor, his wife, vs. The City of Tacoma, a municipal corporation and Chicago,
50 Milwaukee & St. Paul Railway Company a corporation, defendant, and being No. 27359, the above named Chicago, Milwaukee & St. Paul Railway Company and the city of Tacoma, secured against the said Manley Ettor and Mary T. Ettor, his wife, a judgment of dismissal and for costs of the action, and

Whereas, the above named Manley Ettor and Mary T. Ettor, his wife, have given notice of appeal from said judgment to the supreme court of the state of Washington, and are appealing from said judgment;

Now, therefore, if the above named Manley Ettor and Mary T. Ettor, his wife, will pay all costs and damages that may be awarded against them or either of them on the appeal or on the dismissal thereof and shall satisfy and perform such judgment appealed from in case it shall be affirmed, and shall satisfy and perform any judgment or order which the supreme court of the state of Washington may render or make or order to be rendered or made by the superior court, then this obligation shall be void, otherwise to remain in full force and effect.

MANLEY ETTOR,
MARY T. ETTOR,
[CORPORATE SEAL.] UNITED SURETY COMPANY,
By J. H. DAVIS, *Agent.*

Attest:
JOHN E. HEASTY,
Its Attorney in Fact.

Entered Ex. Doc. No. 23, page 444.
Entered Book "K" Bonds, page 48—June 21, 1909.
Filed in Superior Court, June 21, 1909.
J. F. LIBBY, *Clerk*,
By McK., *Deputy*.

51 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 27359.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
THE CITY OF TACOMA, a Municipal Corporation, and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants.

Certificate.

STATE OF WASHINGTON,
County of Pierce, ss:

I, J. F. Libby, county clerk and by virtue of the laws of the state of Washington ex-officio clerk of the superior court of the state of Washington, for Pierce county, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellants to transmit to the supreme court.

In witness whereof, I have hereunto set my hand and seal of the said superior court at my office in the city of Tacoma, this — day of —— A. D. 1909.

[SEAL.]

J. F. LIBBY, *Clerk*.
By —— ——,
Deputy Clerk.

Indorsed: Filed in Superior Court. Sep- 27 1909, J. F. Libby, Clerk, By R. E. McF., Deputy.

52 8379.

In the Superior Court of the State of Washington, in and for the County of Pierce.

No. 27359.

MANLY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants.

Filed Sep. 29, 1909. C. S. Reinhart, Clerk.

Statement of Facts.

Trial March 11, 1909. Before W. O. Chapman, Judge Dept. III.
Filed in Superior Court Apr. 6 1909.
J. F. LIBBY, *Clerk*.
By R. E. McFARLAND, *Deputy*.

Entered App. Coc. No. —, page —.

Plaintiffs' Witnesses.

54 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 27359.

MANLY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants.

Statement of Facts.

Be it remembered, That heretofore and upon, to-wit, the 11th day of March, 1909, this cause came on duly and regularly for hearing before the honorable W. O. Chapman, one of the judges of the above named court, and a jury.

The plaintiffs herein being represented by their attorneys and counsel, Messrs. Boyle, Warburton, Brockway & Quick, and

The defendants herein being represented by their attorneys and counsel, T. L. Stiles, Esq., Frank R. Baker, Esq., Frank Latcham, Esq., appearing for the city, and Messrs. Korte & Griggs, appearing for the Chicago, Milwaukee & St. Paul Railway.

Whereupon the following proceedings were had and done, to-wit:

55 J. A. WILSON, A witness produced on behalf of plaintiffs herein, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I reside in Seattle. My business is that of a civil engineer. At the present time I am employed by the Chicago, Milwaukee & Puget Sound Railway Company, and I have been employed by them for the last five years. I have had something to do with the laying out of the location of the Milwaukee road in the city of Tacoma, I had charge of it. The legal department had charge of the negotiations between the Milwaukee road and the commissioners of Pierce county when the Indian Addition was a part of the county—Mr. Field and Mr. Korte. I also believe that Mr. Griggs and Mr. Reynolds had something to do with it. The grading of East 26th street was done under my direction. It was done during the summer of 1908; the work began in the spring of 1908 but I cannot recall the exact date.

Mr. WARBURTON: We offer in evidence plaintiffs' Identifications "A" and "B."

No objection.

Whereupon said documents were admitted in evidence and marked Plaintiffs' Exhibits "A" and "B" of this date.

The WITNESS: You have called my attention to plaintiffs' "B", being a resolution of the board of county commissioners at the time

the Indian addition was not a part of Tacoma, being a part of the county of Pierce, and I will say that I have seen that before.
56 I had a consultation with the county surveyor in reference to that resolution. It was the predecessor of the present surveyor, I believe his name is Thornton. He was the county engineer, county surveyor at the time I speak of. That consultation was in reference to carrying out the agreement covered by this grading of 26th street covered by this agreement. I submitted a profile to him and asked for his approval. He told me that the territory concerned was about to be taken into the city and he desired that I defer the matter until after that had occurred, and then take it up with the city authorities, which I did. I submitted the same profile to the city engineer, Mr. Davis, during the summer of 1907, but I cannot give you the exact date. I think it was 1907. This agreement was made in 1906, some time prior to the time when we commenced work.

Q. Go on and state what was said there.

Mr. STILES: We object to that, to any statement made by the city engineer, on behalf of the city. The city engineer has no authority whatever to bind the city to do anything of this sort. His duties are limited by the charter to certain things; he does what he is told, and that is his entire authority.

Objection overruled.

Exception reserved by defendants and allowed.

Mr. STILES: We make the further objection as appears from counsel's statement that the allegations of the complaint are that this work was done under the supervision of the city engineer. The witness is asked what was said by the city engineer and we
57 don't know whether it was before or after the vote was taken to take the territory into the city; certainly before that time Mr. Davis would not have said anything.

The COURT: Fix the time.

The WITNESS: The first conversation with Mr. Davis was in the fall of—the late summer or fall of 1907. My understanding was that it was after the Indian Addition was admitted, but I have no knowledge as to the date when it was admitted. If, as you say, it is an admitted fact that it was incorporated in the city of Tacoma on the 9th day of August, 1907, it was subsequent to that date. I submitted a profile or plan for the improvement to him at that time and I have that profile with me, which I now produce. (Document being marked Identification "C.") This Identification "C" is the plat which I submitted to him for the improvement of the street; the surface line shown in white was the—at that time, the surface of the ground. The white line—and the straight lines were the grade that I laid out and asked for his approval of. I have designated the surface line by the letter "A" and the proposed grade by the letter "B" and the line in pencil by "C," so that the jury can easily understand it. The line "B" is the line that has the little circles in it, that being the proposed line of the grade of the street.

Whereupon said document was admitted in evidence and marked Plaintiffs' Exhibit "C" of this date.

The WITNESS: The line which you call my attention to, being the line in pencil marked "C," is the line laid by the city engineer, establishing the grade of the street to which we were to work.

58 Mr. STILES: I move to strike out that testimony; I did not know what was coming—on the ground that no lines of the city engineer—the city engineer has no authority under the charter to establish any grade.

Motion to strike overruled.

Exception reserved by defendants and allowed.

Q. Did he make any exceptions to the proposed grade that you were to improve there?

Mr. STILES: We object to that as immaterial. He had no authority to bind the city by making any objections.

Objection overruled.

Exception reserved by defendants and allowed.

A. He did; he objected to the grade that I had laid saying that the city would not stand for it.

Q. So that the jury may understand it, what difference was there between the grade you proposed to construct and the grade required by the city engineer?

Mr. STILES: We object to that on the same ground and without making any further specific objections, we will ask that our objections run to everything that Mr. Davis did with the witness and except to all that he may have said.

The COURT: Your objection will be overruled and an exception allowed to it.

The WITNESS: You asked the difference? In reference to the location of lots 8 and 9 in block 7339, I will have to refer to the map for that.

Mr. WARBURTON: We offer this map in evidence.

No objection.

Whereupon said document was admitted in evidence and marked Plaintiffs' Exhibit "D" of this date.

59 The WITNESS: The fill in front of these two lots on the grade line that I had laid would have been about 4½ feet; on the grade line that the city engineer laid, it would be about 8 feet. I have not been over the fill since it was made. This, you remember, is on the center line. The slope of the ground might make the fill on the outer slope greater than this; this (indicating) is the center line of the profile. That would be the fill on the center line of the street,—on the upper side it would be less and on the lower side it would be greater. I complied with his request. I was not on the work myself constantly, I was occasionally over the work. I had some discusion with the commissioner of public works, Mr. McGregor, in reference to the grade. Mr. McGregor said that

there were some owners there, property owners, who objected to the height of the fill and the depth of the cuts, things of that kind, and suggested, I think, a reduction of that fill. A short time after that a committee of the council—I am not positive whether Mr. McGregor was along at the time or not—but a committee of the council was there and went over the work and I think that Mr. McGregor and Mr. Davis were there, too. They went over the work and discussed the matter of reducing the grade and changing the fill and decided to leave it as it was. However, the matter of the cut was taken up and the grade was slightly altered in the cut. It was not made deeper; it was made less. I have a profile here showing the surface of the street at the present time, the present finished street. When we completed the work, it was not to my personal knowledge examined by any of the city authori-
60 ities, Mr. McGregor or the engineer or the councilmen—that is, I was not with them; I understand that it was examined. Mr. E. B. Crane would have knowledge of that fact, and the gentleman is here in court.

I do not remember the names of the council committee that I have mentioned, but I think there were three of them.

In reference to the roadway or street along the line of my specifications, which I showed to the city engineer, the idea was to make a passable road; a grade such as is ordinarily laid in a country road. As to how it would compare with the grade, for instance, upon 11th street, I will say that I cannot say how the grades are on 11th street. I received from the county commissioners the resolution, being the resolution that was passed affecting the improvement of M and N streets, and providing for the construction of the roadway along East 26th street, and I had it in my possession. At no time when I was with them, was the city engineer, Mr. Davis, Mr. McGregor, the commissioner of public works, and the council, were they accompanied by the present mayor of the city of Tacoma. To my personal knowledge the work as finally completed on 26th street and as graded, was not accepted or ratified by the commissioner of public works or by the city engineer.

Cross-examination.

(By Mr. STILES:)

The WITNESS: I said that the grade on the street over there would not have exceeded 17% and that is my answer in regard
61 to the street. I am not sure that it would be 17% at any point. I do not know what the grade of 11th street is. The question asked me was if it would be 17%.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: I was over this roadway before anything was done, over this part of 26th street before it was graded. I cannot say that there was a roadway there. Teams had passed up and down, but it

could not be called a roadway. There was a roadway up N street and down 25th street—I was saying on through 26th street. That roadway was not graded at all. On N street it was planked, but not on 26th.

Recross-examination.

(By Mr. STILES:)

The WITNESS: These lots were in the bottom of a draw, about the lowest point—on 26th street between M and N. I recall the name of one member of the city council who was out there, Mr. Rankin. The others I had a very slight acquaintance with, the members of the council, and I do not recall the names of the other members of the committee. Mr. Rankin was there objecting to the change that was proposed on L street by the Union Pacific Railway. We went over L street and 26th street and went over the grade, and my remembrance is that Mr. Rankin approved of the grade at that time. Mr. Rankin apprised me of the fact that he himself was the owner of some lots along this street, but Mr. Rankin's objections were not to the grade but to the drainage at that time. I do not recall the names of the other gentlemen. My impression is
62 that they were members of the streets and alleys committee. As to how I got that impression, I will say that Mr. Crane, our resident engineer, had notified me that a committee of the city council, as I understood it, the streets and alleys committee, would go over the work at a certain time, and I met them here. That was not before any work had been done, after the work was in progress. I should judge that about seventy-five per cent of the work was done at the time they went over it.

Recross-examination.

(By Mr. KORTE:)

The WITNESS: The order passed by the county board was that the work of improvements should be done upon the order of the county commissioners, according to the plans approved by the board of the county surveyor of Pierce county; it was in accordance with this provision of that order that I proceeded to carry out this work, by presenting to the county surveyor this plan of the roadway which I desired to make on 26th street. I presented that to him before the Indian Addition became a part of the city of Tacoma. He told me at that time that the territory would be annexed to the city in a short time and that the city engineer would be the man to present the plans to, and he said he would—he did not care to pass on them for the county but preferred that the matter be held up until the territory was taken into the city and let the city act—he said that any plan approved by the city engineer would be satisfactory to him. We waited until after the territory had been annexed to the city, and then we presented this same plan
63 to the city engineer. Then the city engineer made the corrections on the profile that I have indicated, that is in

evidence. This profile that I had prepared was prepared with a view to the least possible cost to make what I considered a passable road. If I had been the city engineer and laying the grade, I should have laid it very closely to what he finally adopted.

I remember that in constructing this grade on 26th street, it interfered with the water-main on 26th street between J and K streets when we were making the fill. The water-main was broken or damaged and the commissioner of public works ordered it repaired and the city paid the cost of its repair; that occurred at some point between J and G streets; I cannot locate the exact point on 26th; somewhere between G and J, inside the city limits. It was subsequent to the taking in of the Indian Addition that the work was done and the ground was broken. We did no work on 26th street before the plan was approved by the city engineer; there was no work done prior to that time. My recollection is that both the city engineer and the commissioner of public works told me to proceed with the work, but up to this time we had not in any way taken possession of or entered on 26th street at this particular place complained of.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: The water-main which I spoke of as being broken was a water-main carrying city water on 26th street. It was broken by the pressure of earth on it; where we were making the fill, it broke it. It was down in the bottom. The city repaired it—the city did the work.

64 We did this work on the plans presented to the county surveyor; the county surveyor never adopted the plan. The grade, according to the plan originally presented both to the city and county engineer was changed; the work was not done according to our plans; it was done according to the plans of the city. I mean to say that the roadway if built according to the plans prepared would have been a good passable road and I would have undertaken to carry out the requirements in giving a good road. The grade would have been practically the same as the grade which is encountered in going up some of the hills here and in a street constructed along that way, there would be less of a cut and fill. But as to whether it would or would not injure the property abutting on it more than an ordinary road, I will say that I cannot answer that.

Recross-examination.

(By Mr. KORTE:)

The WITNESS: I was constructing what was constructed on 26th street, in consideration of the vacations of L and M streets, in accordance with the views of the county and its successors and it was not to be constructed according to the plans that I thought proper. There was an approval of certain plans by the city and on those plans I did the work and on those alone.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: As to whether or not I did it according to plans requested by the city engineer regardless of what damage it might be to the abutting property, I will say that I did not take the
65 question of damages into consideration at all. We were simply carrying out the instructions of the city engineer and the commissioner of public works.

Recross-examination.

(By Mr. KORTE:)

The WITNESS: We proceeded in that way, and it was done with a view to carrying out the orders of the county commissioners. The material was being hauled over in the vicinity of the broken water main by the direction of the city engineer and the commissioner of public works. We did not care to take it there, but it was under direction of the city engineer and the commissioner of public works. We took it there, and that was down between G and J Streets. It was in making the excavations over there, and taking the material from these excavations between L and P streets that the damage to the water main occurred; we were depositing that on 26th street between J and G, and in doing so, the pipe was broken. 26th street was graded between G and J, between those two points, and the city required that we raise that grade and my recollection is that we raised it about 18 inches and we put the gravel so as to make it a passable roadway there.

(Witness excused.)

66 E. B. CRANE, a witness produced on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: My name is E. B. Crane. At the time the Milwaukee road was constructing its road in the city of Tacoma and at the time it built this roadway on 26th street, I was connected with the Milwaukee road as resident engineer. I have been resident engineer for the company for three years and that covers all the period of the extension in the city of Tacoma. I had charge of the work of improving the grade on East 26th street and I commenced the work about the first of June, 1908. That is not quite a year ago. I had several conversations with the city engineer and the commissioner of public works in regard to going ahead with the work before the first of June; I do not remember the exact date but it was I think—it was discussed for several months before that, commencing in the fall of 1907, and finally in June I commenced to do the work. I do not know that Mr. McGregor and the city engineer were together at any time when I was talking with them before we started the work. I was present at the time this profile, this one here, was

presented to the city engineer for his approval and he said at that time that they wanted to—since they were getting that street graded, they wanted it graded so it would be of some use to the city and that he would place on there the grade that we should grade it to and he did so. Mr. McGregor was not present at that conversation. He indicated it on the map by placing it here in pencil. The
67 line to which I refer is marked "C" on there. I do not remember the exact date that I saw Mr. McGregor about it, but I think it was taken up with Mr. McGregor and he referred us to the city engineer. I think that Mr. McGregor saw the profile. As to whether or not he approved it, I will state that he made no objections to it. I saw Mr. Davis several times subsequent to the conversation I first mentioned. My seeing him was in reference to the details as to drainage, width of the roadway—we finally made the roadway thirty feet wide. That street is eighty feet wide. In grading the street, we followed the instructions given us by the surveyor. The grade of the road now is as we left it. After we had graded it, the commissioner of public works and the city engineer were down over it, during the progress of the work and after—it was very nearly completed any way, and it was all satisfactory, as far as I know. I think they approved it.

After the completion of this roadway we took possession of M and N streets, vacated, and we constructed our railway on that, over and across this M and N street. As to whether or not the city took possession of the street after we completed the roadway, I will say that it was used after we finished it, and it is now being used as a street and highway by the city, and has been ever since we turned it over to the city. Some of the councilmen of the city of Tacoma were present at the time and during the progress of the work. Mr. Rankin was down there several times and Mr. Turnbull. I think that Mr. Giblett was along; he was there during the progress of the work. Among the councilmen who visited the work during the
68 progress of it, at different times, those that I can remember are Mr. Turnbull, Mr. Rankin, Mr. Giblett and Mr. Wilkeson. The streets and alleys committee came over and examined the work on one occasion. They thought that it was a good grade, made a good street out of it and they talked at that time about the drainage I think, one time anyway. There were a couple of drains put in the street there and we were directed to put them there by the city engineer. He directed us to put two lines of pipe in there, one is 18 inch and the other is 12 inch, and he directed me to place both of them in there. I think the work was completed along in the latter part of July, taking about two months. The city engineer was there quite a number of times. As to whether or not he set the grade stakes or examined the grade stakes while I was there, I will say that I think I pointed them out to him. The mayor of the city was over there on one occasion. The mayor was accompanied by Mr. McGregor and Mr. Davis and Mr. Rankin and—I don't remember the streets and alleys committee—but I think Mr. Turnbull was along at that time, Mr. Turnbull and Mr. Giblett I think. They came over to inspect it, they went over it. M and N street- between that alley in

the rear of Mr. Ettor's lots, being the alley between 25th and 26th streets, are closed to the public.

Cross-examination.

(By Mr. STILES:)

The WITNESS: It was Mr. Wilson who presented this plan which I hold in my hand (indicating Exhibit "C",) to Mr. Davis, and that was done in Mr. Davis' office when I was there with Mr. Wilson; I don't remember that we had first been to Mr. McGregor—I don't believe that—I think it was Mr. Davis first. Mr. McGregor was not in the city engineer's office. Mr. Wilson submitted this profile with the grade line to Mr. Davis, and Mr. Davis approved of it and Mr. Davis said that—He told Mr. Davis that he wanted to get this profile approved so that we could get right to work on it when we got ready. Mr. Wilson told him that it was in pursuance of some arrangement that had been made with the county commissioners. Mr. Davis had a copy of the action of the county commissioners in the matter in his office which had been turned over to him by the county. Anyhow they had copies of the agreement. As to whether our company had ever given to the county board of commissioners any assent to the proposition that was made by the board of county commissioners, I will say that I did not have anything to do with the handling of that matter. As to whether or not Mr. Davis told Mr. Wilson and myself at that time that the street between L and M streets could only be graded, if it was graded at all, to the established grades, I will say that I do not remember as to that and yet I will not say that he did not say so. He did not call attention to the fact that L street and M street down to 26th street had been graded already—I did not know that. L and M streets, to 26th had been graded. I do not remember that Mr. Davis told Mr. Wilson and myself that if that hill was graded at all it would have to be graded to the established grade, because if it were not so graded to the established grades, then afterwards, if the city should undertake to reduce the established grade, it would result in lawsuits on the second grade, in regard to the lawsuits, I think he did say the grade should go down to the established grade of L and M streets, that was established. I knew already that the grade of L and M streets had been done to a certain place, and Mr. Wilson agreed that this plan did not conform to those. I saw Mr. McGregor several times, and I used to talk to him—but as to whether or not it was after I saw Mr. Davis and he made this pencil mark on this plan, I will say that it was some few weeks before we started to work. I saw that we went to work about the first of June. If Mr. McGregor went into office in April, I cannot say how soon after that it was that I saw Mr. Davis; I do not remember just exactly the dates. The way it was worked out—it was some time before Mr. McGregor went into office when I took the matter up with Mr. Davis. I think possibly I saw Mr. Davis and the pencil mark was made there before Mr. McGregor was in office at all, and after that, when Mr. McGregor came into office, I called his attention to it in some way. I took up with Mr. McGregor the fact that we might want to com-

mence work at any time in order to get his permission to go ahead and do the work. I had already Mr. Davis' assent as to the grade. My understanding was that in all matters of work pursuant to the city, we had to get the commissioners' permission to go ahead and do the work. I cannot say that Mr. McGregor had any copy of the record made by the board of county commissione-s at that time. I took it as an accepted thing and proposed to go on with it. I did
not go into it with him from the beginning at all, not that I
71 remember of at any specific time, but I think the first time when we referred to the different agreements made by the county and city would be with the grade between L and M streets. The grade between L and M streets was a part of our agreement with the county. It stated in the agreement that the roadway thirty feet was to be graded between L and P streets. I understood that the county commissioners had no authority to make an agreement for the grading of L and M streets inside of the city limits and that is the reason that we took it up with the commissioner. I should say that we commenced work two weeks after I saw Mr. McGregor out there first—it could not have been more than that. Not a great deal substantially had been done then—between N and P streets was the most work. Mr. Rankin was there off and on all the time during the work after we started. I think that Mr. Turnbull was there two or three weeks after we started and there had not been much done then, not a great deal; that was his first visit. To some extent, it was possible to see what the work would look like when finished. I think that Mr. McGregor, Mr. Rankin and the mayor were along with Mr. Turnbull when he came along down there at one time. Mr. Giblett was down there when we were pretty well finished with the work. Mr. McGregor and Mr. Davis and Mr. Linck and Mr. Turnbull were with Mr. Giblett and I think also Mr. Wilkeson. As to whether or not they came there upon any arrangement, I will say that all I know is they notified me that they would be down there.
I don't remember who it was that notified me, but it might
72 have been Mr. McGregor—I couldn't say for sure. Somehow I got word. That was pretty well toward the conclusion of the work. When they got down there, they were looking over the fill between M and N streets; it was claimed by some of the property owners that we were making a higher fill than called for by the plan; Mr. Ettor claimed that, I think. He claimed that we were getting more fill on there—he claimed that we were getting a foot or so more on there. I had seen Mr. Ettor in there before and I had talked with him about it. His objection was that it was about a foot or so too high, but I do not think there was anything done about it. Mr. Ettor did not make any other objections at that time to it—nothing more than the original objection while he was there. He made that objection to the councilmen and the commissioner and the city engineer. That was the streets and alleys committee that was down there this time—that is, I just supposed that is who they were, Mr. Giblett is a member, I know, and I think that Mr. Turnbull is also, but I am not sure; I am not acquainted with the committees. I do not know how many that committee consists of. I do not think that

there were seven councilmen there aside from Mr. Rankin; there was quite a number of them there, quite a number of men, and I did not know all of them.

Cross-examination.

(By Mr. KORTE:)

The WITNESS: There is no railroad on 26th street. Our road does not in any way go on 26th street and what grading we did on 26th street was not for any railway purposes whatever; it was done in pursuance of the agreement between the company and the board
73 of county commissioners and in consideration of the vacation of L and M streets and the putting in there of that grading was in accordance with the requirements that we make them a roadway which should be satisfactory to the board of county commissioners or the county surveyor, on 26th street, and that is how we came to grade on 26th street. In doing this grading, we did not in any way take possession or enter on 26th street before the approval of the profile or the depth of the cut and fill was made by the surveyor, and that surveyor was the city engineer. It was approved by the city engineer as well as by the commissioner of public works, Mr. McGregor. At the time that I talked with Mr. McGregor, he knew that our road did not run on 26th street; we talked about that. This grade which we wanted him to give us the right to do, was in pursuance of and carried out the consideration named in the agreement with the county, and at that time the Indian Addition was in the city limits,—had been voted in. Mr. Davis was the city engineer at that time and Mr. McGregor was the commissioner of public works; the grade that we made there and which now exists conforms to the grade on the profile that is now in evidence, marked Exhibit "C." If we had made a different grade there than that approved by the city, it is a fact that it would not in any way conform to the established grade of L and M streets; in other words, there would be a drop off in the grade which we suggested to the city and county originally. The grade which was in fact made there for the county or city is the only practical grade or street-way that could be made under those conditions. I remember some controversy that
74 arose, occasioned by the orders for the replacing of the six inch pipe that we came in contact with on this construction work on 26th street, wherein the commissioner of public works reported to the committee on privileges and franchises to the effect that—"As to the regrading and filling of E. 26th street by the Chicago, Milwaukee & St. Paul Railway Company, the weight of the filling breaks a six inch water main and I have taken the matter up with the company, etc.—" I remember about that. In accordance with the recommendation of the city council, the filling was cut down to one foot.—. After the committee reported back the following.—"It was recommended that the commissioner instruct the Chicago, Milwaukee & St. Paul Railway to raise this street one foot by filling with gravel." the filling was cut down to one foot so that the weight of that additional dirt would not break the pipe and what was done was done in pursuance of this instruction by the

committee on privileges and franchises, this filling in with one foot of gravel, after we received that instruction from this committee. Whatever we did on that street we did in pursuance of carrying out this agreement known as the order made by the county commissioners. Whatever was done there, the railway itself paid for.

Recross-examination.

(By Mr. STILES:)

The WITNESS: With reference to this water pipe between G and J streets, it was not a part of this arrangement with the county. We were dumping the dirt over there and we put it in the street as a place to get rid of it. And this dirt which was hauled there
75 came from that particular place and we were directed to haul the dirt in there but they did not direct us to haul it from any particular spot; we had waste dirt that we wanted to dispose of and we put it there, we had to put the dirt there anyway.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: The original proposition of the board of county commissioners was that we should grade from East L to East P street. That place was not between East L and East P street-, this was J. East L street and M street were already graded as a matter of fact at that time, running up and down the hill. I did not make the plat, so I have nothing to say concerning the fact as to when this plat was prepared; it was prepared in view of the fact that those streets were already graded—this original proposition that we were to grade this street between L and M streets. The chances are, however, that Mr. Wilson did make it at my request, or the request of the Milwaukee road, it is not very likely that the grades I suggested there are the ones that we could use in going from L to M streets, I would not say that the railroad company was not acting in good faith when they presented this plan to the county commissioners and the city of Tacoma. When we presented that to the city authorities, we did it with a feeling that we were acting in perfect good faith with the board of county commissioners and the city authorities. We never submitted to Mr. Ettor the plans for constructing this road way before we constructed it. We never consulted him at all as to how we should build the road.

(Witness excused.)

76 H. J. MCGREGOR, a witness produced on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I am the commissioner of public works and I have been so employed or engaged since April last and I was commissioner of public works while this improvement was going on on East 26th

street. I was aware of what was going on there. I believe the mayor of the city of Tacoma was aware of what was going on. I do not recall of him being over there with me but I would not say that he was not over there. I think there are seven members on the streets & alleys committee and there are the same number on there now as when this work was going on. Mr. Turnbull is the chairman, and the committee is composed of Mr. Lynn, Mr. Doud, Mr. Giblett and Mr. Wilkeson. On that part of the work between East L and East M streets, I think Mr. Wilkeson and Mr. Rankin and Mr. Turnbull and Mr. Giblett and I think also Mr. Brand was there, but I am not positive. Those are members of the committee and members of the council that were aware that this work was going on. There was no objections made to the work until the time that the fill was almost completed up to opposite—about where the second water conduit went across underneath the fill.

Cross-examination.

(By Mr. STILES:)

The WITNESS: When I say that these gentlemen, Mr, Wilkeson and Mr. Rankin and the rest, were there, they were there together at one time; I cannot just recall whether they were all there
77 at that time; I recall one time but it was not on that controversy that they were there; it was another matter: it was not that particular fill that they were there about; they went up there to see about the water pipe. That was not about the time or very near the time that this grading was completed; it was before they had the fill made. If I understand the particular place where you now have reference to, it is where there is a fill between M and N streets on the east side; the fill was made as the cut was made, between L and M streets. I believe they were there after the cut was made. They were there but not particularly to see that; they were there on other matters in connection with the intersection of the vacated streets, and how they would intersect with the streets already graded and the cuts on other streets and also in the matter of P street. As to when the council as a body first knew about this matter,—the matter came up,—the first notice I had of the matter was in regard to the right of way down to where P street crosses, close to the base, I mean—some man was objecting to them going so close to it, and in order to find the plat and the arrangements that had been made by the Chicago, Milwaukee & St. Paul Railroad, I came to the court house to look up the exact position of where that spur or track would go with relation to this man's land. That was the difficulty over in P street, and that is the first time it was called to my attention. That is when the trestle was building over there. The work was pretty well advanced at that time.

78 Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: I did not report to the city council that this work was completed over there. I do not think that the Street & Alleys

Committee ever adopted resolutions approving this work. The matter never came up before the city council as a body only with relation to the question about retaining the water main. As regards what was done on 26th street, in consideration of the vacation of L and M streets, that had never been brought to the notice of the city council at any time in an official way, as a body, but the streets & alleys committee knew it was being done. It was not, to my knowledge, ever talked of in the city council. If I was present, I would have known that it had been brought before the city council in any way, and I am usually present at the meetings. When I knew that this grading was being done, I understood that it was in carrying out this agreement or order of the county board. The only objection I raised was that one party that lived up there, he called attention to the fact, but to the work as a whole, according to the plans which the city engineer had approved, I raised no objection.

(Witness excused.)

79 A. A. RANKIN, a witness produced on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I am a member of the city council and I have been a member of the city council since last April. I was aware of the commencement of the grading on 26th street about the time it commenced. I live close by there. Mr. Giblett does not live over there, he lives on East H, I think, and 34th. He lives in that part of the country and he was aware of it, I think. Not all of the members of the council were aware of the commencement of the work and as it went on. I don't think they paid much attention to it; that is, the members that were not interested particularly in it. I think Mr. Turnbull, Mr. Wilkeson, Mr. Brand, Mr. Giblett, was over there shortly after the work had been commenced.

Cross-examination.

(By Mr. KORTE:)

The WITNESS: I said that I became a member of the city council on the 19th of April, I think, 1908. I do not believe that any body objected to the manner of constructing the work over there or anything of that kind, to the council in any of their meetings; I think I called attention to the fact that there was one party complaining there that they were making a deeper fill, a greater fill than the stakes called for; I am not sure whether I called attention to that, however, or not; however, a number of the council went over there, and the commissioner of public works—I say that I couldn't
80 call to mind whether I made the complaint in the council or not, but I called the attention of the commissioner and the city engineer to it, to the fact that Mr. Ettor was complaining. I never objected personally to what was going on there, to the city

council. I owned some lots in that neighborhood. I was very much opposed to the plan in the first place, when the county commissioners adopted it, and we fought that thing for nine months, every property owner interested in the street was opposed to the action of the county commissioners in regard to it and after they made the agreement with the Chicago, Milwaukee & St. Paul Railway, I of course acquiesced in it; I thought if I had any grievance that I could get redress in the courts; that was my idea of it, and not in the city council. I do not think that I complained to the city council at any time as to the manner of the construction of the work while it was going on. I am not a member of the streets & alleys committee. I live on 31st street at the present time. I had a store within two blocks at the time it was going on. I was well aware of the work going on. Knowing very well, after the vacations were made that this cut and fill would have to be made, in order to get an outlet, which already lays in that way, that was my principal objection to the vacation of two of these streets, one after the other; if the court will permit me, I will explain the conditions over there—after the hearings were all over, I think the matter was delayed for about eight months, eight or nine months; the property owners in there objected to the vacations of both of those streets, knowing very well that this condition would rise later on, and the
81 county commissioners overruled their objections and vacated the streets and entered into this agreement to make this grade.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: As a matter of fact, the property owners here between M and N streets on 26th had a very easy access to the street below there, to Puyallup; that goes without saying; the jury saw that; I was over there with them and I suppose I overstepped my rights; I was not aware of the fact at the time, until my attention was called to it; I explained why we objected to the vacation. I was not here when the court instructed the jury to go over there.

(Witness excused.)

82 L. TURNBULL, a witness produced on behalf of plaintiff, being first duly sworn testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I have been a councilman for pretty near three years and I was a councilman last spring. I am a member of the streets & Alleys committee. I know that some members of the committee on streets and alleys was aware of the commencement of this work and while the work was going on, but I don't know that the committee as a whole was. I do not remember that the matter was discussed in committee meeting. I believe that Mr. Giblett and Mr. Brand, of the committee, went over there to look at it, and I think

also Mr. Wilkeson, as well as myself, and Mr. Rankin was present. I did not see the mayor when he was there; I was not there when he was there.

Cross-examination.

(By Mr. STILES:)

The WITNESS: Mr. Rankin, I believe, drew our attention to the work and I believe it was on his invitation that we went there; there was other matters. When I first saw and knew about the work, it had not progressed very far; they had not made any fill yet; they had their stakes showing what the fill would be. The dirt out of the cut was being hauled up into the lower portions between L and M streets—I think they were between M and N streets. The engineer in charge explained what the fill and cut would be, but I do not remember that he showed me any plan or profile of the work; he had stakes there showing what the fills and cuts would be.

83 One reason we went there I think was to look into the crossing of the Milwaukee across L street and I believe at the invitation of Mr. Rankin also to look at this work on L street and the crossing on P street. So far as we gentlemen were concerned, our information was that this was something that had been contracted for by the county commissioners, and we simply went there to look at it.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: I am aware of the fact that between L and M streets, the county commissioners had nothing to do with that, that was never a part of the Indian Addition, and I knew that at the time.

Recross-examination.

(By Mr. KORTE:)

The WITNESS: I do not remember that the matter was submitted to the committee for approval after the work was completed according to the plans and profile submitted. I never made any objection to it although I knew what was there. It is not customary in city business of that kind for a matter of that nature to come before the counsel for approval unless it is asked for. The commissioner of public works does that. The commissioner of public works approves work that is being done, if it is done according to plans and specifications submitted to the engineer, and their approval usually goes.

(Witness excused.)

84 MANLEY ETTOR, one of the Plaintiffs herein, being first duly sworn, testified in his own behalf as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I am the plaintiff in this case. I have my deed with me and I am the owner of lots 8 and 9; I have been in possession of that property for about seven years. I am the owner of lots 8 and 9 in block 7639, Indian Addition to the city of Tacoma. The improvements that I have on that property are a house, a barn, and I had to clean off the brush when I got the lots. My house is 26 by 28 and has ten rooms; I built that five years ago this coming spring. I reside on the property. Prior to the time of the construction of this road, I was offered once $6,000 for that property, lots 8 and 9, including my house.

Cross-examination.

(By Mr. STILES:)

The WITNESS: I am a teamster and I have been a teamster for about five or six years. I have not sold any property besides this. I own three lots opposite to that property—not opposite but on the corner of N and 29th street—on the same street. I have owned that property about seven years I think. Property has been sold on both sides of me there, about three or four years ago, a couple of years ago, and property was not very cheap then. Those are the latest sales that I know of in that neighborhood. I had some idea as to what the market was at that time, three years ago—two years ago, and them before, just a little before the grade, just before and after the railroad excitement was on over there. At that time
85 there was some property sold in that block, on both sides of them two lots; that was about three years ago, something like that, but I don't remember just when.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: Lots were sold just immediately to the west of lot 7 about that time. Property in that neighborhood generally has not decreased anything in value. I know of the sale of lot 7 to the Merrill Investment Company immediately to the west of me. That lot is on the same level with this property, but they have got lots of improvements; there was a little cottage in there.

Recross-examination.

(By Mr. STILES:)

The WITNESS: I did not make the sale myself of this property. The owner told me about it.

Mr. WARBURTON: We offer in evidence the deed from Commissioner C. A. Snowden, to Mr. Ettor.

Whereupon said document is admitted in evidence without objection and marked plaintiff's Exhibit "E" of this date.

The WITNESS: I have kept myself conversant with the values of property up to the time of the grading of this street in the immediate neighborhood of my property, and I stated yesterday that I knew the value of this property at the time of this grading or prior to it. I would say that the value of this property would be about between seven and eight thousand dollars; that was the market value at that time, that year; a good many asked for the property; they got several offers.

86 That is the way we used to go down there; it is a part of the Puyallup avenue; there is no other road to go to Puyallup. The grade on 26th street in front of my house was level; there was a kind of a little slope but not much. There has been about twelve foot of a grade placed in front of my property at one place and eight foot at another; the eight foot grade is on the east side, the highest part of it is eight and the twelve foot grade is on the west side, probably a couple of inches more or less. I have been measuring it since the fill; they claimed they cut it down, but they did not; it is there today and anybody can see that. I measured it last night.

As to the amount of damage that has accrued to my property by reason of this fill, I will say that I don't think a third now of what they offered me before. I would say a couple of thousand dollars it is worth now. There was that difference in value caused by the fill. I have no access to the street in front, because there is a wall up there; I have got to go around the alley; I have got to go down and then come up again. It has had this effect on the view from the lower part of the house—you cannot see nothing but the fill, nothing but the rocks, and anybody can see that today opposite me.

Recross-examination.

(By Mr. KORTE:)

The WITNESS: I live on this property. I cannot drive up in front; I have got to go to the alley; I can get to the lot with a team by going into the alley and through it. There is a slope there, you know, but I would say that there is four or five feet between

87 the outside line of my lot and this fill. The fill does not come up to the sidewalk, because there is no sidewalk there; we never had a sidewalk there. I would say that the fill comes within four or five feet of the lot line and at some places two feet, some places five. I measured the height of the fill. I couldn't give you an estimate of the distance between the bottom of the fill and the property line, but I would say in some places it is three feet and some places five. There is plenty of room there yet for a sidewalk. We are on the street and we can walk on the street in going into my property, by going down. I can go along in front of my lot and pass on the street and then go forward—then go a block and go on the fill; I mean in the middle of the street. The sidewalks are usually placed along side the property line. There is plenty of

room left on the sidewalk in front of my lots. It has never been disturbed by the grading, but there is about six inches of water in there. There is plenty of land to walk on if the walk was built there; at some places where the fill is not high, you can build a sidewalk, but when the fill comes up to twelve feet, I don't think it is scarcely three feet, and there is six inches of water laying in there because it comes from the pipe under the fill. If there was no water, there would be plenty of room between the line and the filling to get into my property; I can build ten feet if I get up high. The higher I get, the wider it would be; down below it is two and a half or three feet in one place and if I go a couple of feet higher, I have more room. Before this fill was made there, before this street was cut, I had to go up and down hill like in a country road,
88 but we had good ground.

When I bought this land, it was platted out in a lot; it was not like a farm. There were streets on both sides. I know when I bought this that the top would come down and that I would go up and I had put a fill in there, but not twelve feet though. I knew they couldn't make a city street without leveling it in some way, building it up. With regard to the hill toward M street, they cut down both grades you know, some places eighteen feet, but on both sides of me the fills were not higher than twelve feet on this street, not on both sides; M street is on one side and N street is on the other. As to whether or not this grade in there just made those two hills come together on a level, and really made a level street where before it was down and up, I will say that I should judge it is high where it should be low; anybody can see that. On my lots, the grade came level with the ground before the grade was made in there, on the hill, on N street. And on the other end of course they had to cut through that big hill and make it come down to the level, it was about four feet below N street. You can see N street to-day in front of my place; anybody can see that intersection of N street and 26th street.

I say that this property was worth $8,000 before the fill and had been that way for about three years; I had a good many demands for them. I bought this property about seven years ago; I have got the deed here. The price I paid for it was $200, that was the market at that time. I kept the value the same for about three years, I had a good many demands. The lots were worth between
89 seven and eight thousand dollars, the lots and improvements. You would take about sixteen hundred dollars out for the improvements, because the barn cost a hundred and twenty-five dollars and the house fifteen hundred dollars; take that out and you will see how much they are worth. I think the lots are worth five or six thousand dollars. They have raised from two hundred dollars to five or six thousand dollars in those six years. Just before the Milwaukee road commenced to buy property there, I think the lots were worth about a thousand dollars apiece. We did not know about the railroad company buying land over there then; the first was sold for five thousand dollars without knowing who it was. I know of some lots selling in that neighborhood, in that block; that was right after he bought from the government, he sold for three

hundred dollars; you know about the same month, a couple of months, unless I can say that was the first year, then the government doubled up the price right away and you couldn't buy any more; they used to ask one thousand dollars. I think the property is worth more than two thousand dollars with the improvements but the ground I would say, about two thousand dollars. If I testified awhile ago that the ground was worth two thousand dollars, that is what I am saying now; the ground is worth two thousand dollars without the improvements; with the improvements, why, I don't think I can get that—I would be glad to. There is not much sale around there for anything, because nobody wants to go into that hole there; you cannot rent them there; the house in there has been empty since the fill; they moved out when they got in front
90 of the house; I can see that, in the whole neighborhood, anybody in that neighborhood will tell you the same thing. That is not the only vacant house in three blocks from L street to N street; there is three or four that I know of.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: If I desired to move my furniture in and out of the house, I would have to haul him in the alley—back him in the alley, load him in the wagon and run around to M street and no goods could be delivered by any firm in town that supplied goods such as groceries, from the front of the street, right in front of the house. Of course with a package in the hand, or a coat, you can get to the house, but otherwise you have got to go around.

Referring to the lots immediately adjoining to the west, lot No. 7, I know about it from the fellow who bought him, the fellow who just owned him.

Recross-examination.

(By Mr. STILES:)

The WITNESS: I say that the footing of this grade extends about within three feet of my fence in some places that is the slope, you know, that goes there. You can walk up and down that slope to the street, but I think a young man can walk him better than I can, and it is certainly steeper than the hill was when we had to go clear out to 26th street.

(Witness excused.)

91 W. H. MILLER, a witness produced on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I reside in Tacoma and I have lived in Tacoma for twenty-two years. I am engaged in the real estate business and

I have been engaged in that business for about twelve years; I am now connected with the firm of R. E. Anderson & Company and I have been with that firm for about twelve years. That firm is engaged in the real estate business, has a fairly extensive scale. As compared with the other firms in the city in that business, I presume we compare favorably with the other leaders in the same line of business. Our firm is a corporation and I am the vice president of the company. Of course, Mr. Anderson manages the business when he is at home, and he is at home about half the time, and when he is away, I manage the business.

I have a fair idea of the values of property situated in the vicinity of lots 8 and 9 in block 7639. As a general rule, I keep in close touch with the values of property in all parts of the city. I have had occasion in the last two or three years to examine into the values of property on East 26th street, and I am interested in some property over there on East 26th street. There are eight lots over there that I have an interest in; I cannot name them now. The property was purchased by the Merrill Investment Company. I am acquainted with lot 7 in block 7639. That is one of the lots that was purchased by that company. That property was purchased
92 about two and a half years ago, prior to the grading of this street, some time prior. In addition to that, we own three lots on the corner in this same block and four lots in the next block, No. 7641, that is to the east. All of these lots were purchased about the same time; my recollection is about two and a half years ago.

I was acquainted with the market value of this property of Mr. Ettor's, just prior to the construction of this roadway, that is, lots 8 and 9 in block 7639. At the time we purchased that property in there, the market value I presume was what we paid for it, and I think advanced to probably twenty-five hundred or three thousand dollars a lot within six months afterwards; that is what I state the market value at the time of the construction of the road, twenty-five hundred to three thousand dollars a lot. I say that lots 8 and 9 were worth from two to three thousand dollars just immediately before and I am referring to the lots together with the building on it—I would put a value on them in there of six thousand dollars. Assuming that this road was constructed in there in June and July last year, I should say that the market value of that property any time within the last eight months was between twenty-five hundred and three thousand dollars. I should say that part of the difference in price was a natural one and the other part was an unnatural one, I consider created by the vacating of the streets and the grade established on that street. I have placed the estimate of the damage caused by the filling in of the property, building the road in front of the property, at about fifteen hundred dollars, in my own
93 mind.

Lot No. 7 lays on the same level in reference to Mr. Ettor's lots, I believe, and on the same street adjoining it, next to it, next west. There are some improvements on the lots that I bought. There is a small house there. It is not the same kind of a house that is on Mr. Ettor's lots; it is a smaller house; only one story, I

do not consider it of much value. The Merrill Investment Company bought this property and I know what was paid for the property. I did not pay the man, I did not make the transaction myself. All I know about the price paid is what I left in my bank account. I am not the Merrill Investment Company myself. I am not a stockholder in that corporation. I paid two thousand dollars for that property.

There are no improvements on these lots, 10, 11 and 12. As I remember it, they are considerably higher than Mr. Ettor's property, in elevation, as the ground rises there, rises gradually toward the slope. I paid five thousand dollars for that property, consisting of three lots.

Cross-examination.

(By Mr. KORTE:)

The WITNESS: To the best of my recollection, I bought those lots in there about two and a half years ago; in April, May and June of 1908, in any of those months, I think likely those lots had the same market value then that they have now, but as to whether I would have been able to sell them at that time for that price, in June, 1908, I will say that is a difficult question to answer; I made no effort to do so; there was no demand for property in there about that time. not much demand. I do not know that it is a fact that, due
94 to the railroad company having secured this roadway, or having contracted this roadway, depreciated that property, or that there was no demand for the lots at that time; of course that condition over there in a way was a condition which existed throughout the whole city. The time when I bought those lots was not before the railroad was located in there, it was some time after. It was after the railroad secured its right of vay. I do not think there has been any change in the market value of real estate in that vicinity since those streets were vacated, after those roads were built. The vacation of L and M streets had something to do with the depreciation, but as to how much depreciation I allow in the value of the lots due to L and M and N streets being opened up, I will say that I never gave that a thought; you asked for an estimate for the damage created by the vacating of those streets, and I was confining the conditions to the damage caused by the construction of the roadway. As to how much I allow for the vacation of L and M streets, I will say that that is a very difficult question to answer; I do not believe I can form any correct idea caused by the vacating of those streets there, but I think the percentage would vary on the different lots. If you address it to the Ettor lots, the lots in question, as near as I can tell, I would say fifteen to twenty per cent. and as to the damage caused by the vacation of L and M streets, or this grade in front of the lots, I will say that my estimate of the damage on that property is fifteen hundred dollars, but I cannot go down into mental arithmetic on it. I make an estimate of damage in dollars and cents. As to how much of the fifteen hundred
95 dollars damages I allow for the vacation of L and M streets and as to how much I allow for the building of this grade in

front of the lots, I will say that the value of that property—I estimated it some time prior to the time this work was done at six thousand dollars, and its value now at twenty-five hundred dollars; that is a difference of thirty-five hundred dollars; fifteen hundred dollars of that amount I believe to be—is my estimate of the damage caused by the grade there, and the other one thousand dollars divided up between the vacating of those streets and the natural conditions. By natural conditions I do not mean that it is laying there in a hole; I mean rather that the general market throughout the city, the slow real estate market. The amount that I fix by reason of the grade is fifteen hundred dollars, but in the fifteen hundred dollars, I do not estimate anything with reference to the vacation of L and M streets.

That property is being utilized as residence property, and it is not adapted to any other purpose at the present time that I would say and I do not think that there was any time within the history of the city in the last two or three years when it was considered adapted for any other purpose, except as a speculation. It was speculation that run these lots up to my estimate of twenty-five hundred to three thousand dollars and as to what that speculation was based on, I would say that my theory of that would be that they were along side the Chicago, Milwaukee & St. Paul Railroad where there might be a possibility for securing a site for warehouse purposes, and furthermore, when I made the purchase on it, I had an idea
96 that I might be able to buy some residences on the Chicago, Milwaukee & St. Paul right of way, and move them over on these lots at small expense and rent them; furthermore, it was first intended that the Chicago, Milwaukee & St. Paul coming in by that route from Seattle, that there was a possibility that there might be other railroads coming in that might choose a similar route; it was demonstrated by the Chicago, Milwaukee & St. Paul coming in that it was a feasible route and all those things go to make speculation. That speculative period practically reached its highest point about —well, it was about six months after the earthquake, whenever that was. I think I bought my lots on the rise during that speculative period. As to whether or not I have ever seen the time since I bought those lots that I could dispose of them for the price that I paid for them, I will say that I never tried, but I might possibly have done so. There were some other parties that bought lots up there, similarly situated, two blocks that I had in mind and some across the street.

I am not acquainted with the values of other lots in that neighborhood beyond on 26th street; I have never paid much attention to the values on 26th street; while it may be a fact that all the lots in that neighborhood went booming when the railroad came in, all the south part of the city did not. Speaking of the railroad right of way there, and values, I will say that I did not like to be considered crazy, and at the same time I won't admit a slightly insane delusion, but in the light of subsequent events it seemed to be somewhat that way. I do not say there has been a toboggan slide
97 in values there; I don't think there has been. You can sell lots over there if you put the price on, whether it is on 26th

street or not. Speaking of the use of these lots for warehouse purposes in connection with a railroad or for any other railroad right of way, any other railroad that would come along 26th street or in this addition, and as to whether or not the grading would count or not, I would say that it is necessary to have a public highway, and whether it is graded up high or low would not make any difference, I would say that that could not be determined until some particular test was put to it. It is better, of course, to have a graded street. When people go into that kind of a market, ordinarily they look into the matter of whether the property has to be graded up a little or down; they look into a great deal of things, in the eyes of the real estate men, which are unnecessary.

In connection with this 26th street grade, the situation there since the grade is established, is rather an imposition on all the resident property owners in there; it has destroyed the value of their property as residence property because it is an undesirable locality to live in. These particular pair of lots are undesirable because you cannot get from the grade of the street on to the lots unless you are a pretty good jumper. So far as I know, the house is just the same as it was before and the fences are just the same and the barn is the same and the trees are the same, and a man when he is inside that house lives just as well as he could before; when he is inside the house it will be just as satisfactory as it was before,
98 unless he has some view that he wants to make use of; the view that was there before was not worth much because it was across swampy ground and up the hill, I believe.

As to what there is damages that lot except the mere fact that one cannot walk into the middle of the street on the original grade, I will say that the owner is deprived of the use of the public highway that was put there for his particular benefit, and there is no highway there now for his benefit. If the present condition of that highway has induced travel that was not there before, it does not benefit it; it is a rule that it adds to the value of property to induce many people to go back and forth on the street, but that depends on the class of travel. It is a fact that we real estate men urge grading and improving the street for the very purpose of giving access to the property by roads and so add to the value of the property, that is our purpose. It is a theory that every improvement, grading and the like of that, adds to the value of the property. It is a fair thoroughfare now, but as to whether or not it is better than it was before, I will say that I have my doubts about that and yet I do not remember much about the road as it was before. When I bought those lots, I did not go down and make a critical examination to ascertain whether there was any road there or not. Some of those lots lie low in a moist damp place and in order to have made the property right, it would have been somewhat necessary to have raised the roadway somewhat above the grade, and when I say, "somewhat," I mean if they had filled the contour of the
99 ground the same as they did the other end of 26th street, and had not left some so high and some so low. The lot line must be some two or three feet higher on the north side than on the

south side. If it had been filled there to three or four feet I would not necessarily have considered it a damage, in making the necessary road, if they had graded the full width of the street; admitting that that would have made a hill in front of Ettor's lots, of course that is one of the conditions to figure on; the drainage of the street would collect in the yard, and there would be a certain amount of damage likely then with that fill there. I do not think a practical grade could have been made there so as to get out of the water without damaging Ettor's property, unless they followed absolutely the topography of the country. As to whether or not anything of a road can be made on an up and down line in boggy ground, I will say there was a road there I believe, and I presume that was the county road.

I do not bear any relation to the Merrill Investment Company. The Merrill Investment Company is a corporation, but I'll swear I do not know any of the stockholders aside from C. E. Merrill. I said that I was interested in lot No. 7, and I purchased that with the money of the Merrill Investment Company, and my interest was afterwards conveyed to me; the Merrill Investment Company owns its interest there now, a one-half interest. I think that the Merrill Investment Company has three suits pending here for damages against these same defendants, and I am interested in those suits to
the same extent that I am interested in Lot No. 7. I do not
100 know that the Merrill Investment Company is suing in its
own interest and in mine too. I have not put on record the deed of conveyance from the Merrill Investment Company to myself. I have talked with Mr. Merrill about this damage suit. I knew about the pendency of these three suits on the part of the Merrill Investment Company and I was consulted in bringing them. I expect to participate in the proceeds of any recovery, and to that extent I am interested in the Merrill Investment Company suits.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: The general depression of which I have spoken exists over the whole city, but probably there was more of a depression over there in that section than there was generally over the city; there is not an active demand for property, that is all. That is what I referred to in response to Judge Stiles' cross examination—in active demand, and it has fluctuated for possibly about two years now. That exists generally over the city. The tendency of the general market is stationary, I think, but this south end of town is substantially the same as what it was three years ago; there has been no marked decrease, but it is only when in that case, where a man is forced to sell—People who own property over there in that neighborhood, in the immediate neighborhood of 26th street, pretty generally hold about the same values that they did three years ago.

As to whether or not one could rent property with an embankment eight to twelve feet high, composed of gravel, immedi-
101 ately in front of him as well as he can immediately on the street, if it was on the level of the street, I will say that he

could rent it to better advantage of course if his house was on the level of the street. To fill the property up to the level of the street and raise the house would improve it as a residence property, and in order to put it in good marketable, salable shape, that would be the best thing to do.

Recross-examination.

(By Mr. STILES:)

The WITNESS: As to whether or not if the lot were built up and the house raised up, it would do away with this damage that has been done, I will say that to fill the lot, raise the house to the level of the street, and fill in between the roadway and the lot line so it had the same advantages of the street, would certainly benefit the property, and it would largely do away with this damage that we have been talking about.

(Witness excused.)

102 W. D. E. ANDERSON, a witness produced on behalf of Plaintiffs, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I have lived here for twenty-two years and I am in the real estate business. I have been engaged in the real estate business for twenty-two years. I have kept advised of the market value of property in the various parts of the city of Tacoma during that time. I am acquainted with Mr. Ettor's property over on East 26th street and I have examined the property. I was over there the other day for the purpose of familiarizing myself with it as a witness in this case. I have been acquainted with that section of the city for the last—ever since I came here. I have been keeping myself informed as to the market values of property in that vicinity ever since the addition was platted from the government. The market value of this property immediately prior to June, 1908, the two lots with the house on them, I think was probably from fifty-five hundred to six thousand dollars. I have examined the roadway that was constructed by the city and the Chicago, Milwaukee & St. Paul Railroad. As to the height of it, I looked at it myself, and I consider that the construction of that roadway damaged the property to the extent of forty-five to fifty per cent.—from thirty-five hundred dollars to three thousand dollars. In order to put that property in marketable shape now after the road has been constructed there, it would be necessary to put in a retaining wall and fill it in.

103 Cross-examination.

(By Mr. STILES:)

The WITNESS: Louis Foss and myself have been together for a good many years in business. Our place of business is in the National Bank of Commerce Building, Room 602. A year ago I had

some property for sale in the neighborhood of Mr. Ettor's property; I had some on Puyallup avenue and some on 25th street. I did not have any for sale on 26th street. I knew of some that was offered for sale and I knew the prices asked and the prices that were paid for property on 26th street in this neighborhood. That was about two years ago. But as to whether or not I knew about any one year ago, I will say, no, I do not know exactly—Taking it two years ago, I knew of property in the block laying south of this which was for sale or offered for sale; there were two lots for sale, Calvin Phillips had them for sale for four thousand dollars, two lots. I do not know that he sold them for four thousand dollars, and I could not tell you whether he has got them yet. I knew of some lots along 25th and 26th streets between L and P streets immediately prior to a year ago, that were for sale—I knew of those lots that the Merrill Investment Company bought. I knew of them at the time that they bought them. I base my idea of the value of this property a year ago at fifty-five hundred to six thousand dollars on the way property was selling there, properties surrounding. There is no property around there that has been used for anything except the cheaper class of residences and that is all they are used for. Any
104 price that was paid for that property beyond the price which was justified by the purpose for which it was to be used was speculative; it was with the prospect of being business property later on, such as stores and one thing and another. If you are on the grade, this grade does not interfere with the prospect of that neighborhood as business property. If you desired to utilize that property, you would have lots of room there for a basement in the building, if you used it for business purposes, between the top of the grade and the bottom, providing it is fixed up. If you wanted to use it for a business location, you could go down and make a cellar or a basement without any expense of excavation if the full width of the street is graded, and it is carried out. As to whether or not, if the full width of the street had been graded at this time, the damage would be less, I would say that the present time it would have been about the same, and if there had been a retaining wall put in, I would have considered it a little less. If you get into a buggy and go over there, you can drive up to the front of the premises. But you would have to be a good walker to walk down the bank; I could do it, but I would not want a lady to do it or any old man. It would be hardly practicable to make a small stair there unless you put a fence there, because you are liable to run into the stairway; if you are talking about where the teams do not go, you would have to fill it up. A stair would undoubtedly do back on the property, but how are you going to get from the street to the property? The city would hardly allow you to put stairways in the street. I don't know any-
105 thing about whether the city would do that itself—I never saw it done, but of course you could go down that stairway. That would not obviate the trouble that I find because I cannot get down from the street, not altogether, because it would be very unhandy to have grocery men or workmen coming in that way. I am acquainted with the premises on C street between Division

avenue and South Second street, and there are a number of places there where the only access is by stairway, a great deal higher than this and those are the choicest residence places in town, but the people knew that when they bought. I think that somebody could have bought this property without knowing that some kind of a grade had to be made; if they had read the city charter and any real estate man would know that they would have to conform to the lay of the ground. but I would never think that they would fill in 12 feet in front of me; I would say about 2 or 3 feet. If it is put up 2 or 3 feet, I would not think that the property would be damaged any and the damage comes from the difference between the 2 or 3 feet and whatever the actual height is. There is nothing else that I think of that enters as an element in making up this damage which I have specified, fifty-five hundred or six thousand dollars.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: It will be necessary to put a retaining wall around the lot, fill up the street in front of it, with a retaining wall. That would cost no less than twenty-five hundred dollars.

106 Recross-examination.

(By Mr. STILES:)

The WITNESS: If you were to put up a building say 25 or 50 feet in front of that lot, and the foundation of that building were to go down, that would not be a retaining wall because you could not have that, that is never done anywheres; you never use sand or concrete wall for retaining dirt, not in a building where you have a basement.

(Witness excused.)

107 L. Y. STAYTON, a witness produced on behalf of plaintiff-, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I live out on South J Street, No. 3623, and I have lived in Tacoma for twenty years this spring. I have been in a variety of business during that time, but principally contracting; I have built houses and graded streets, moved dirt, cement and concrete, worked principally at this. I have engaged in the different classes of work as occasion required me; I have done some grading, excavating, filling and putting in foundations and basements, and I have finished at least one or two buildings. I have been requested to examine lots 8 and 9 in block 7639, known as the Ettor property on 26th street. I was requested to make an estimate for filling that ground up to the level of the street and putting in the foundation necessary to support that house. I made an estimate there that filling those lots without retaining walls, filling up the full bottom of the lots,

that is, for filling up the whole block through, keeping the dirt from going on to the other lots adjoining, raising the house and putting the foundation under as it is at present, to the same height, that is, as it would be in relation to the new filled street, as it was to the old filled street, at about twenty-three hundred dollars. That is the sum total for raising the house and making the fill. That includes ten feet for the front fill; that would about make, as I would estimate it,
the depth of fill and area would bring it up to about the same
108 relation to the present grade of the street as the house stood
to the former grade, as it appeared. I did not make any calculation on the retaining wall; at a glance, I should judge without making a calculation, that it would double the expense; it would take me perhaps five or six minutes to make that calculation; I know what it would require to hold that volume of earth, as it would have to be filled in there; I make specifications and plans for them very often and contract to build them.

Cross-examination.

(By Mr. STILES:)

The WITNESS: I propose to fill in their lots and the space in front out to the street fill, that is the way I made the calculation. The house is 26 by 28 feet. The front is 26 ft. Then there are some porches: that is the square, the main body of the house. I did not measure to find out how near the house was to the front end of the lot, but I should say approximately eight or ten feet—from the lot line, I should say; I might be a fraction of a foot or two or three feet, one way or the other off; I did not take any particular notice of that. So far as access to this property is concerned from the grade of the street, it would be entirely accomplished if I filled in the street up to the front of the house—that could be done by building the steps up from the house; as to whether or not I would have to fill from the front end to the rear end in order to enable Mr. Ettor to get his house on the grade of the street, I say that he could go on the
second story.
109 The foundation of that house consists of blocks or bricks
under it, with wooden posts. There is no continuous sand or brick or cement foundation. I did not figure on any foundation different from the present foundation, but to raise the house up to its relative height above the street and put the same foundation that is under it now, in the same condition. It will require about 3,000 cubic yards of dirt to fill those lots very near to the present street, including the fill in the street. I think the dirt is worth about seventy-five cents a yard. I have not figured on the retaining wall yet. This twenty-three hundred dollars that I have mentioned makes up the 3,000 yards of dirt at seventy-five cents a yard, and the raising of the house. I think I figured about two hundred dollars for raising the house. However, I would state that I have made the estimate quite conservative on the cost of it, if you wanted to do it.

(Witness excused.)

110 M. A. DILLON, a witness produced on behalf of Plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I am in the real estate business and I have been in the real estate business for four or five years. Prior to that time I was a contractor—excavating, building railroads and running logging camps, etc. My experience has been somewhat limited in building houses. I have had some experience in building retaining walls. I am somewhat rusty on the proposition of estimating the cost of constructing retaining walls or filling in lots at the present time; it is a long time since I done any, but I have an idea approximately. I said that I had been engaged in the real estate business for five years and I have as such kept in touch with the values of property generally throughout the city of Tacoma, because that is a part of my business. I have a limited acquaintance with the lots belonging to Mr. Ettor over on 26th street, lots 8 and 9 in block 7639, and I have examined that property a little with reference to determining the value of the property; I have examined it since I have been called as a witness in this case only. I do not know what the market value of that property was prior to June a year ago. As to the value of that property, I will say that I am not particularly acquainted with the values over in that part of the town and I don't believe I could give an intelligent estimate of it. I had some property listed with me on Puyallup avenue, but this property, I don't know what the condition of this property was before
111 the road was made but I would consider—in arriving at the market value of property, that depends on what people are asking for the property and what it is selling for, and I am — able to state what the market value of that property is.

Cross-examination.

(By Mr. STILES:)

The WITNESS: I have no direct knowledge of any sales made of property in that vicinity prior to a year ago—within a short time—that is only just hearsay. I know that property was held over there at a certain figure from what I got from different buyers and real estate men; that is what people were asked for it. I do not know that any sales were made out there at that time. Of course, I have never given that particular property any particular attention at all and I did not think of it until I came now on the stand.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: I Think that about thirty-five or thirty-six hundred dollars would be a pretty good figure for that property, the lots with the improvements, prior to the filling. As to the fair

market value for the property after the street was graded as it is and to place the grade as it was from eight to twelve feet high in front of the house, graded as it is, to make the necessary improvements to that house so that you could rent it, I think would cost really more than it is worth. It looks to me as if that excavation in front of the place makes it almost impossible to get any revenue from it, to do anything with it. I could give you a kind
112 of an off-hand estimate on the cost of filling that lot so as to bring the lots up level with the street and raise the house up. You would have to put a retaining wall in front and you would have to put a retaining wall all around it; then you would have to fill in up to the street, raise the house up, and I think it would cost in the neighborhood of between four thousand and forty-five hundred dollars to do that. A person could raise that building up level with the street and fill it all in solid with gravel, there would be no way of hauling the gravel except they would co-operate together and fill the whole block; that is the only way. They would have to co-operate together and fill the whole block or else build retaining walls to hold the dirt and put in brick buildings, each one separate.

Recross-examination.

(By Mr. STILES:)

The WITNESS: I think so far as getting any revenue from the property, that that grade there has made that property worthless; it is in bad shape to get any revenue from. I don't know that a man could live very comfortably there; he would have to change that water in order to avoid contaminations around there but I don't know what water is there now that was not there before. As to whether or not it is springy ground, I would say that there are some sewer pipes or tile pipes under the street and it flows into the lots. They would have to take that water away in some way. I do not know anything about the period in the winter time when that water runs there. There are other houses along in that neighborhood which are in the same situation, or very nearly so, and there
113 are people living in them. After they get down in there, I presume that they live just as comfortably now as they did before. I do not know how accessible they were before, so I cannot say that the only question now is in getting in and out. I suppose before they were all on a level with the road there. I presume the only difference between the former case and the present case is simply a question of getting into the house and out from the house. I did not state that the damage of thirty-five hundred or thirty-six hundred dollars to this property was the mere question of getting into that house—I did not say that; I mean to say that in order to make that property productive and to get any revenue from it, you would have to expend that amount of money; that is my judgment. There may be other places in town where people are paying rent that are in worse or in as bad a situation as that, but I do say that I think from the experience that I had there yesterday that there would have to be some changes made before it

could be rented to advantage. I do not know what it brought prior to the street being put in there, I do not know what the rental value was or what it was rented for, and I do not know but what it would rent for as much now as it did then. I do not think I would take the property if those improvements were not put in but after it was filled in, I kind of think it would be worth forty-five hundred dollars because it is a pretty good house and a person might rent it to reasonably good advantage. Referring to lots on Tacoma avenue where lots of property was below the grade, 9, 10 or even 12 feet and the slope was toward the Bay, I would consider that they
114 were worthless until they were improved. I do not know how you could build a building over there without building a retaining wall to hold the material or else put it up on blocking. I don't know whether you could build a basement under it or not; I don't know how you could get into it. If you should raise the house up to the level of the street, you could put another story under it but how are you going to hold the house up? In order to make a job of it, you would have to put a retaining wall and fill it in with dirt or else make a basement. The house could be raised level with the street, but what is going to protect the house from going back or you might have another story, just as you please, but that is a matter of judgment for the man that owns the property, and if he built it satisfactorily, and substantially, he would have just as good and satisfactory a situation. Under those circumstances, he would not have to fill the back part of his lots unless he wanted to. I do not know whether the slope is from the north or not. I do not know as it is any less below than the front of the lot is, that is the grade of the street. It might be that if he filled his lot clear back and put a wall up there, that he would have his lot that much higher than the alley, then, that is what I say, he would be in trouble again. I presume under those circumstances he would have to fill the alley in order to get a satisfactory situation again. I have not included that in my estimate. I do not know how many more thousand that would be. The whole difficulty is in getting from the house up on to that grade and that has got to be overcome in some way, otherwise the man that lives there lives under the disadvantage of going up
115 and down that grade. I do not know that you could overcome that by some steps from the grade as the *feet* is filled thirty feet wide. A man could stick up a ladder and run up and down or a man could put steps in there by counter-sinking them into the street. I guess you could put wooden steps in there for fifteen or twenty dollars, but under those circumstances I could not say that he would have just as good a place as anybody. The only way to remedy that house would be the way that I have outlined; that is my judgment, so far as that is concerned, I suppose the ladders would be a temporary remedy. If they lasted ten or fifteen years, that would be a reasonable time. I have not paid much attention to the matter, so I cannot say that I know of any good houses where the people in order to reach the street have to go up and down steps; that has not come under my real estate ob-

servation. I have lived here for thirty years, and I expect I have visited that street a great many times over in that locality.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: That house is not a desirable rentable house; it has not got a good view; it is away down in a hole and there is a lot of contaminated water flowing there.

Recross-examination.

(By Mr. STILES:)

The WITNESS: By contaminated water, I mean that there was a lot of water that run through yesterday, black and dirty looking, but I don't know what the cause is. The soil is black soil.

(Witness excused.)

116 L. Y. STAYTON, recalled for further examination, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: Figuring on building the retaining wall, to retain the earth as the levels appear to me—I have no blue-print or way of taking the levels on the street in regard to the lots, and I made the best calculation I could—it would figure, figuring on building the wall from the property line, fifty feet back to the present grade of the lot, as regards the fill of the street in front, it would cost about two thousand, six hundred and eighty-seven dollars.

Cross-examination.

(By Mr. STILES:)

The WITNESS: The wall I propose to build is around three sides of the lot and I propose to build it of cement and concrete. It would be three feet at the base, one foot at the top, with a footing under the wall, one foot thick and four feet in width; I figured on twelve feet in height; that is the depth that I made up my mind that the street was above the present grade level in the yard. I could not say what others would do or to what extent you consider a man reasonable, and I do not think I would do this; however, that is to consider—I often see people do things that I would not do myself. I do not think any man in advising another man to fix his place, would advise him to do a thing of that kind.

Redirect examination.

(By Mr. WARBURTON:)

The WITNESS: A man would have to put a retaining wall
117 in order to prevent the gravel from going over on to his neighbor's property. I have not applied the rule that the

railroad engineers or the city engineers use in figuring on the basis of such a wall; I made it less; their figures would be three-sevenths of the base and height, and this is less.

(Witness excused.)

118 E. S. FREITCH, a witness produced on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I reside at 1221 East 26th street, Tacoma, which is on the corner of M and 26th street, about half a block, I guess, from this property in question here. I couldn't tell you exactly how long I have lived there, but it is somewheres about twelve years. I was familiar with the road that run along 26th street prior to the time this road was built there and I had occasion to use that road all the time with a team. It was a passable road all that time. Up to the time that they constructed this fill in front of Mr. Ettor's property, there was not any fill in front of his property there.

Cross-examination.

(By Mr. STILES:)

The WITNESS: I have a suit against the city and the railroad company in this same matter.

(Witness excused.)

119 ALVIN MUELLER, a witness produced on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I reside at 222 South 31st street in the city of Tacoma and I have lived in this city about three years. I have lived in Pierce county all my life and I am an owner of property in Tacoma. I have had charge of my own property in Tacoma about four years, I guess. I am in the real estate business at the present time, connected with Morrison & Balkwill, which is one of the leading real estate firms in this city.

I have a general idea of the values of property over on 26th street, and as a real estate man, I have kept track of the values of property over in that section of the city as well as other sections of the city. I am acquainted with the reasonable fair market value of Mr. Ettor's property over on 26th street about last May or June, before they filled up 26th street. I have made an examination into that property, made an investigation as to the value of it since I was called as a witness here. I would state that the fair market value of that property at that time was about four thousand dollars, in-

cluding the improvements on it. The fair market value of that property after the street was constructed as it was constructed there, with a fill of twelve feet high, I would say that it has been depreciated about fifty per cent and that depreciation is made by reason of the fill.

120 Cross-examination.

(By Mr. STILES:)

The WITNESS: That property was worth about two thousand dollars less after the fill than it was before. Four thousand dollars was about the value of that property about a year ago, but I don't think that before that it was worth any more than that at any time. There is no other cause tending to make property less valuable in that neighborhood besides this grade; I do not think any cause has depreciated the value; I do not think there is any change in the streets round about there that would have any effect on it. I should say that property was worth now about two thousand dollars, and it is simply because that fill is there that makes it so much less valuable; it renders it undesirable for what it is supposed to be used for—residence—that is what it was valuable for and it was used for that purpose. I do not know that there is any immediate prospect of that particular fifty feet being used for any other purpose than a residence. There might have been a prospect of its being used for something else in the eyes of the speculator, but I presume, with some of them, that time has gone by as far as I know. The reason that this property is less desirable that it was before is this—as a rule the houses that are used for residences are not as desirable—this property won't rent for as much money as it did before; what I mean is this, this property is below grade and you cannot rent it for as much as a piece that is even up with the grade. I do not think this is a sentimental idea of living below the grade;
121 that has, of course, something to do with it, that is true. As to whether or not a man when he gets in on these premises can live there just as well as he did before, I would say that there is a difference of opinion about that; I can only state my personal opinion; my personal opinion would be that I would not want it for a home. I would rather have some other place for a home. However, I do not say that the property would be absolutely worthless.

Redirect examination.

(By Mr. QUICK:)

The WITNESS: I would say that this place is inaccessible as to getting in fuel. There is at this time a demand for houses in that part of the town for renting purposes, especially in walking distance of the factories and there is an increased activity over there; the houses that are desirable will rent very well and to good advantage in that locality.

Recross-examination.

(By Mr. STILES:)

The WITNESS: I know about some other houses that are rented over there—we have charge of the property; however, it is not on that same street, it is in that locality. I do not know of any property in this same street that is rented, and I do not know whether the rents have been decreased by reason of this grade or not.

(Witness excused.)

122 GEO. J. CLINDT, a witness produced on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

(By Mr. WARBURTON:)

The WITNESS: I am in the real estate business and I have the rental of houses. I know where Mr. Ettor's house is on lots 8 and 9 in block 7639—I know about where it is. I have charge of a house in close proximity to that property, 1309, belonging to J. Cerretti, but I do not know that the next house is owned by the Merrill Investment Company. The house on Lot No. 6 is an eight room house and it is plastered. I have had charge of the rental of that for some time—I think it *is* just about the time that the grade was put through there, but I am not certain as to that; I think it was about that time. I say that the property was rented up to that time and the tenant moved out; the lady was up to the office one day and she said that they were going to move—at that time I don't think that they had done anything yet—they were going to go to work in there and spoil the street and no one would live there. They moved out and I have not been able to rent the property since. I have not been able to rent it because nobody wanted to live down in a hole.

Cross-examination.

(By Mr. STILES:)

The WITNESS: This property rented for $16.00, but I don't know just how long it rented for that figure; I did not have the rental of it before that time and I never collected the rental on it before that time. When I say that it rented for $16.00, I took the
123 owner's word for it and the people that lived in the house.

Mr. STILES: We move to strike out the testimony from the record on the ground that it is hearsay.

The COURT: It may be stricken and the jury will be instructed that the testimony of this witness as to rental value may be disregarded; I will cover that in a general instruction.

(Witness excused.)

S. F. BULLARD, a witness produced on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

(By Mr. QUICK:)

The WITNESS: I am assistant city engineer of this city. The city has no grade established by ordinance east of M street on 26th.

(Witness excused.)
Plaintiff- rests.

Mr. STILES: The defendant, the city of Tacoma, now moves that the court non-suit the plaintiffs in this action on the ground that the evidence submitted is insufficient to support the cause of action alleged in the complaint or any cause of action whatever against the said defendant.

Mr. KORTE: The defendant, the Chicago, Milwaukee & St.
124 Paul Railway now moves the court that the court non-suit the plaintiffs in this action on the ground that the evidence submitted is insufficient to support the cause of action alleged in the complaint or any cause of action whatever against the said defendant, the Chicago, Milwaukee & St. Paul Railway.

Whereupon the matter was argued to the court by counsel for the respective parties at considerable length.

The COURT (after argument): I will be compelled, in view of the law as I have taken it, to grant the motion. I do not see any other course for the court to pursue.

Mr. WARBURTON: We will reserve an exception to the ruling of the court.

The COURT: Exception allowed.

(Whereupon the jury was called into court and addressed as follows:)

The COURT: Gentlemen of the jury, under the ruling of the court upon some motions addressed to it, it will not be necessary for you gentlemen to give this case any further consideration, so you may be excused until to-morrow morning at ten o'clock; you are excused from further consideration of this case.

125 STATE OF WASHINGTON,
County of Pierce, ss:

I, W. O. Chapman, one of the judges of the Superior Court of the State of Washington in and for the county of Pierce, before whom the foregoing case was heard and determined, do hereby certify that the matters and proceedings set forth in the foregoing statement of facts are all of the matters and proceedings occurring upon the trial of said cause; that said statement, together with all of the exhibits and other written evidence on file in said cause and attached to said statement of facts, contains all of the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; that said statement of facts,

with the exhibits attached thereto are hereby made a part of the record in said cause; the clerk of this court being hereby directed to attach all of said exhibits hereto.

The counsel for the respective parties hereto being present and concurring herein.

In witness whereof, I have hereunto set my hand this first day of September, A. D. 1909.

W. O. CHAPMAN, *Judge.*

Indorsed.

TACOMA, *April* 6, '09.

Received a copy of the within proposed statement of facts this 6th day of April, 1909.

STILES, BAKER & LATCHAM,
Att'ys for City of Tacoma.
H. S. GRIGGS,
Of Atty's Chicago, M. & St. P. Ry.

126 EXHIBIT "A."

To the Board of County Commissioners of Pierce County, State of Washington:

The petition of the Chicago, Milwaukee and St. Paul Railway Company of Washington states as follows:

1. That it is a corporation duly organized and existing under the laws of the State of Washington, and is authorized to locate, construct, maintain and operate a steam railroad for the carriage of freight and passengers from points within the city of Tacoma to the easterly boundary line of the State of Washington.

2. That said company has located its line of railroad through the county of Pierce and to and within said city of Tacoma, and has acquired the greater portion of its right of way for said line of railroad in said county, and has also acquired lots, blocks and tracts of land in said city of Tacoma, and adjoining that city, to be used for right of way for main and side tracks, yard and terminal grounds, freight houses, warehouses, and other buildings and structures required for carrying on its business as such common carrier; that its main line of railroad as located and staked out, extending from the north line of Pierce county to the city of Tacoma, crosses the Puyallup river on lot one (1) section ten (10), township twenty (20), north range three (3) east, W. M., and extends in a westerly direction across Indian tracts two (2), twenty (20), twenty-one (21) blocks 7548, 7646, 7645, and to and upon block 7542 all in the Indian Addition to the city of Tacoma; that said company has acquired a right of way across said Indian tracts and said blocks 7548, 7646 and 7645; and has also acquired all of blocks 7542, 7540 and 7538 of said Indian Addition, and other property within the city limits of said city of Tacoma, upon which to construct, maintain and operate main and side tracks, warehouses, freight

houses, and other buildings and structures, to be used in the
127 transaction of its business as a common carrier, and is the owner in fee of all of said blocks 7542, 7340 and 7538; that said railway company desires the vacation of those portions of "M" and "N" streets in said Indian Addition, as shown by the plat of said addition on file in the office of the county auditor of Pierce county, and particularly described as follows:

All that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of south 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540, produced across said "M" street.

All that portion of "N" street lying between blocks 7540 and 7542 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7540 and 7542, produced across said "N" street, each of the portions of said streets so to be vacated being a strip one hundred thirty (130) feet in length and eighty (80) feet in width.

3. Said railway company further states that said vacation is desired for the purpose of constructing, maintaining and operating main and side tracks, yards and terminal grounds, upon, over and across the portions of said streets hereinbefore described, and for erecting and maintaining freight houses, warehouses and other buildings and structures thereon, or upon parts thereof, all to be used in the transaction of its business as a common carrier;

Wherefore, petitioner prays this Honorable Board that all those portions of said "M" and "N" streets, hereinbefore described, be vacated in the manner provided by law; that this petition be heard and determined at the sitting or session of said board of county commissioners to be held on the 22nd day of June, A. D. 1906, at 10 o'clock A. M. or as soon thereafter as the same may be heard;
128 and that, in the meantime, notice of the pendency of said petition be given, as provided by law.

Dated June 1st, A. D. 1906.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF WASHINGTON,
By H. R. WILLIAMS, *President.*

Attest:
E. W. COOK,
[SEAL.] *Secretary.*

STATE OF WASHINGTON,
County of King, ss:

H. R. Williams, being first duly sworn, deposes and says that he is the president of the Chicago, Milwaukee and St. Paul Railway Company of Washington, and makes this verification on its behalf; that he has read the foregoing petition and knows the contents thereof; and that he believes it to be true.

H. R. WILLIAMS.

Subscribed and sworn to before me this 1st day of June, A. D. 1906.

[SEAL.] F. M. BARKWILL,
Notary Public in and for the State of Washington, County of King, Residing at Seattle, Therein.

129 EXHIBIT "B."

In the Matter of the Vacation of Portions of "M" and "N" Streets, Indian Addition, Pierce County, Washington.

This matter coming on for hearing on this 13th day of October, A. D. 1906, and it appearing to the board of county commissioners by the records and papers on file herein, that a petition asking fo. the vacation of parts of certain streets as hereinafter described was filed by the Chicago, Milwaukee and St. Paul Railway Company of Washington with the said Board of County Commissioners, and that on the 1st day of June, 1906, notices of the filing of such petitions asking for such vacation were duly posted, all as required by law, and the time set for the hearing of said petition, towit on the 22nd day of June, 1906;

That on said date said matter was heard, and at said time certain protests and objections to the vacation of said streets *was* made and filed, and duly considered by the board, and thereafter said matter was continued from time to time.

Now, therefore, the said board of county commissioners being fully advised in the premises,

Do hereby order, subject to the terms and conditions hereinafter set forth, that all that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540, produced across said "M" street; and also all that portion of "N" street lying between blocks 7540 and 7542 of said Indian Addition and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7540 and 7542, produced across said "N" street; each of said portions of said strip being a strip of land one hundred and thirty (130) feet in length and eighty (80) feet in width, all as shown on map
130 or plat of the Indian Addition to the city of Tacoma, filed for record in the office of the auditor of the county of Pierce on the 1st day of May, 1906, be and the same are hereby vacated, and the said strips of land above described so vacated are hereby attached to the lots, blocks and parcels of land abutting on the said streets so vacated.

This order of vacation is made subject to the following terms and conditions:

I.

That the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall, before this order of vacation becomes

MAPS

TOO

LARGE

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operative, at its, or their own expense and without cost or charges to or upon the said county of Pierce, improve South 26th street between East "L" street and Bay street in Indian Addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory roadway thirty feet in width along the center of said South 26th street between said limits, and by laying and constructing a good and sufficient plank sidewalk on one side of said South 26th street as directed by the said board of county commissioners of Pierce county, from said East "L" street to East "P" street, in said Indian Addition.

The work and improvement shall be done upon order of the said board of county commissioners and according to plans prepared or approved by the said board or the county surveyor of said Pierce county and to the satisfaction and approval of the said board of county commissioners of Pierce county, and shall in any event be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or take exclusive possession of said vacated portions of "M" and "N" streets, and shall be done within ninety days after being notified by said board to do said work and improve said street.

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II.

The said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall pay all damages which the county of Pierce may become liable for resulting to any person, persons firm or corporation, or property, by reason of such vacation, and the said railway company, its successors and assigns shall forever hold the said county of Pierce harmless from all such claims and damages.

III.

Upon the failure of the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, to comply with all of the above terms and conditions the said vacations shall become null and void and of no force and effect.

STATE OF WASHINGTON,
County of Pierce, ss:

I, I. M. Howell, County Auditor, in and for Pierce County, state of Washington, do hereby certify that the foregoing is a full, true and correct copy of an order of the board of county commissioners, dated October 13, A. D. 1906, and can be found in volume 26, p. 409 of the commissioners' record.

In witness whereof, I have hereunto set my hand and affixed my official seal this 31st day of October, A. D. 1906.

[SEAL.]

I. M. HOWELL,
County Auditor,
By A. J. WEISBACH,
Deputy.

(Here follows map marked page 132.)

133 Indorsed on foregoing plat: 27359 Pl'f C. Filed in open court, Dep't No. 3, Mar. 11, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep. "C" 8379. Office Dvision Engineer Work, Seattle. Record.

(Here follows map marked page 134.)

135 Indorsed on foregoing plat: Tacoma 26th St. grade. 27359. Pl'f Ex. D. Filed in open court, Dep't No. 3, Mar. 11, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

MAPS

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LARGE

FOR

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136 *Commissioner's Deed.*

STATE OF WASHINGTON,
County of Pierce, ss:

Whereas, By virtue of the power vested in the President of the United States, by the Act of Congress, approved March third, eighteen hundred and ninety-three (27 Stat., 612), "for making appropriations for the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with Indian tribes for the fiscal year ending June Thirtieth, eighteen hundred and ninety-four," commissioners were appointed by the President of the United States to select, appraise, and sell such portions of the allotted lands as are not required for homes for the Indian allottees, and also, "that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup Reservation, in the State of Washington;" and

Whereas, The undersigned was appointed Commissioner for Puyallup lands under the Indian appropriation act, approved June seventh, eighteen hundred and ninety-seven (30 Stat., 62); and

Whereas, The lands herein below described, as a part of said agency tract not needed for school purposes, have been selected, which selection has been duly concurred in by a majority of the Indians of said reservation, in writing, consenting to the sale of the same, and constituting the undersigned Trustee to sell said lands and make deeds to the purchasers for the same; and

Whereas, The selection and appraisement of that part of the agency tract not needed for school purposes, as aforesaid, has been duly approved by the Secretary of the Interior, and offered for sale at public auction, after due notice thereof, at Tacoma, on the first day of May, nineteen hundred and one, and was knocked off to Manly Ettor, Tacoma, Washington, he being the highest and best bidder;

137 Now, therefore, I, the undersigned, Commissioner of the United States, and trustee for said Puyallup Indians, do, by virtue of the power and authority vested in me by the Acts of Congress aforesaid, and agreement with the Puyallup Indians, hereby sell, convey and transfer the following-described land, to wit:

Lots Eight (8) and nine (9) in block seven thousand six hundred and thirty-nine (7639) in the Indian addition to the city of Tacoma, according to plat of said addition on file in the office of the auditor of Pierce county, Washington, unto the said Manly Ettor, purchaser, as aforesaid, for and in consideration of the sum of two hundred no/100 dollars ($200.00) seventy no/100 dollars ($70.00), of which amount has been paid in cash, and one-fifth of the remainder is to be paid on or before the 1st day of May, nineteen hundred and two; one-fifth on or before the 1st day of May, nineteen hundred and three; one-fifth on or before the 1st day of May, nineteen hundred and four; one-fifth on or before the 1st day of May, nineteen hundred and five, and the other remaining

one-fifth on or before the 1st day of May, nineteen hundred and six.

Each of such deferred payments to bear interest at the rate of six per centum per annum from the date of sale of the lands hereby conveyed to the date of payment thereof.

This deed shall operate as a complete conveyance of the land herein described upon full payment of the purchase money, evidenced hereon by some officer or agent of the United States Government duly authorized by the Secretary of the Interior to collect the deferred payments.

In witness whereof, I have hereunto set my hand and affixed my seal this 1st day of May, nineteen hundred and one.

C. A. SNOWDON, [SEAL.]
Trustee and Commissioner.

(Revenue Stamp.)

Signed, sealed and delivered in the presence of:

CHAS. BEDFORD,
HENRY A. YOUNG,
Witnesses.

138 STATE OF WASHINGTON,
County of Pierce, ss:

On the 25th day of June, 1901, personally appeared before me, Chas. Bedford, a notary public in and for said county and state, Clinton A. Snowdon, Commissioner and Trustee, known to me to be the party signing the above instrument, and acknowledging that, as such commissioner and trustee, he signed and executed the same on the day and date first above written, for the purposes and uses therein expressed and set forth.

CHAS. BEDFORD,
Notary Public, Residing at Tacoma, Washington.

DEPARTMENT OF THE INTERIOR, *Sept.* 26, 1901. W. H. G.

Approved:

THOS. RYAN,
Acting Secretary.

J. T. B.
[SEAL.]

Indorsements.

17996. Commissioner's Deed.

Clinton A. Snowdon, Commissioner, to Manly Ettor.

OFFICE OF INDIAN AFFAIRS, LAND DIVISION.

Recorded Nov. 12, 1901, in Puyallup Deed Book, Agency Tract Lots, Vol. 3, page 64.

STATE OF WASHINGTON,
Pierce County, ss:

Filed for Record in the Auditor's Office of Pierce County, Washington, by request of Manley Ettor, on the Jul- 25 1908, at 30 minutes past 2 o'clock p. m., and duly recorded in Book 276 of Deeds, page 299.

Witness my hand Aug. 1, 1906.

I. M. HOWELL,
Auditor Pierce Co., Wash.,
By W. A. STEUART, *Deputy.*

-1.75. Indexed by Phelps.

139 Compared by G. Z.

DEPARTMENT OF THE INTERIOR,
INDIAN DIVISION,
Sept. 24, 1901.

7750. Cause 27359.

Received Feb. 28 1902 the sum of twenty seven 29/100, being amount of first deferred payment, and interest for the within-described land.

C. A. SNOWDON, *Commissioner.*

35334. Indian Office. Incl. No. 36. 1901.
53352. Indian Office. Manley Ettor. Incl. No. 40. $27.29. 1901.

Received Feb. 22, 1902, of Manley Ettor, the sum of twenty-seven 29/100 dollars ($27 29/100) being amount of second deferred payment, and interest, for the within-described land.

C. A. SNOWDON, *Commissioner.*

Received Feb. 28, 1902, of Manley Ettor, the sum of twenty-seven 29/100 dollars ($27 29/100) being amount of third deferred payment, and interest, for the within-described land.

C. A. SNOWDON, *Commissioner.*

Received May 8, 1905, of Manley Ettor the sum of thirty-two 27/100 dollars ($32 27/100) being amount of fourth deferred payment, and interest, for the within described land.

HARRY F. LISTON,
Trustee and Supt. Puy. Ind. School.
Y.

Received July 25, 1906, of Manley Ettor the sum of thirty-four 16/100 dollars ($34 16/100) being amount of fifth deferred payment, and interest, for the within-described land.

HARRY F. LISTON,
Trustee and Supt. Puy. Ind. School.
Y.

Plf. Ex. E.
Filed in open Court, Dept. No. 3, Mar. 12, 1909.
J. F. LIBBY, *Clerk*,
By I. C. SWETT, *Dep.*

140 Department One.

Filed Jan. 21st, 1910.

No. 8379.

MANLEY ETTOR and WIFE, Appellants,
vs.
CITY OF TACOMA and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondents.

This is an action instituted by plaintiffs to recover damages consequent upon grading certain streets in the city of Tacoma. Under §47, Chap. 84, Laws of 1893, and §48, Chap. 153, Laws of 1907, §745 Bal. Code, such damages were recoverable. The legislature of 1909, §1, Chap. 80, Laws 1909, repealed this law so that no remedy existed at the time this case was tried in the lower court. Judgment was rendered against plaintiffs in the court below, and they have appealed.

Many questions are raised, but we think the act of the last legislature has reduced this case to a single abstract question of law. In the absence of some statute, a municipal corporation is not liable for damages resulting from the original grading of a street, alley, or avenue, either within the original corporate limits or in any addition thereto. The power to establish grades is incident to its charter, and is implied from the dedication. It was so held in Fletcher v. Seattle, 43 Wash. 627, where in the first opinion rendered by the court the reasons for the rule are set forth and further illuminated by ample quotation from Mr. Dillon's work on Municipal Corporations, Vol. 2, (4th ed.) §995. Thereafter the attention of the court was called to a statute, §745, Bal. Code, being the same as §47 of the laws of 1893, in so far as it applies to cases of this character, and the opinion in the Fletcher case was reversed and recovery was allowed. Reference to the former act will show that it in terms provided that the section allowing a recovery for grading streets should apply only to the original grading of such streets, avenues, or alleys. To bring the law of this state in accord with the rule in all others as well as the great weight of authority and reason as we shall presume, the legislature of 1909 amended the existing law, changing the proviso of the former acts so that it now reads as fol-
141 lows: "That this section shall not apply to the original grading of such street, avenue, or alley." This change was effected while the present action was pending; indeed, while it was on trial, and it is urged on the one hand that the right to recover damages being repealed without saving exitsing causes of action, no recovery can be had, while on the other hand it is insisted that the

act of 1909 operates as a deprivation of a right to recover damages already accrued, and must be held to be in contravention of the constitution in so far as it affects existing causes of action. If the act of 1909 does deprive appellants of a substantive right, their contention should be sustained, as a similar contention was sustained in Miller v. Union Mill Co., 45 Wash. 199. The cases cited to sustain the judgment of the court in that case clearly point the distinction that must exist in all cases and upon which there has been slight difference of opinion on the part of courts and textwriters. The right of action in the Miller case and in all similar cases was sustained, not because the right had accrued while the statute was in existence, but because a right existed independent of the statute. This distinguishes most if not all of the cases relied upon by the appellant. In appellant's brief it is said:

"It may be further urged that where a statute gives a corporation or municipality a right to condemn property and such statute is repealed while condemnation is pending, the proceeding falls to the ground with the repeal of the statute. Such a case in no manner resembles the case at bar. A condemnation proceeding is instituted before the property is taken, a proceeding to determine what the rights of the parties will be when the property is subsequently taken by the condemning corporation. No one, of course, has any vested rights in the matter until the property has been taken or damaged. But when this has been done, as plaintiffs' property in this case was damaged, then the case is entirely different and the rights resulting from such taking or damaging cannot be divested by legislative enactment. This appears plainly from the cases of Stevens v. Marshall, 3 Pinney 203; City v. Eaton, 83 Ill., 535, already referred to, and 8 Cyc. 906, where it is said that 'the right of a land owner to damages for land taken for public use becomes absolute, when the property is actually taken.' That the rights to damages become absolute and vested as soon as the property is taken or damaged is evident also from the fact that the condemnation proceedings cannot thereafter be abandoned. Shannahan v. City of Waterbury, 63 Conn. 28 Atl. 611; Wood v. Trustees, 1646 Pa. St. 159, 30 Atl. 237; St. Louis Ry. Co. v. Teeters, 68 Ill. 144."

The error of this reasoning lies in this, that the original grade of a street, avenue, or alley in the platted portion of a city or town is not a taking or damaging within the meaning of art. 1, §16
142 of the constitution. This is made plain in the first opinion in the Fletcher case. See also:

Callender v. Marsh, 1 Pick 418;
Pontiac v. Carter, 32 Mich. 164;
Redcliff v. Brooklyn, 4 N. Y. 195;
Wilson v. New York, 1 Denio, 595;

In 2 Dillon, Mun. Corp., 995b, the author says:

"For the reasons above suggested, it seems to us that, on principle, the mere provision of the constitution imposing a liability for property damaged for public use does not create a liability on the part of the municipality for reducing the natural surface of the

street, in the course of its normal and ordinary improvement for street purposes proper, to a grade line for the first time established. If there are cases to the contrary we doubt whether they were well considered and think that they are not well decided. Admitting that under the amended constitutional provision under consideration a municipality may be required to make compensation, not only in cases where there is an actual physical invasion of the adjoining property, but also a physical disturbance of a right or easement connected therewith, such as the easement of access, or of light and air, which causes a special damage over and above that which is sustained by the public generally, still such rights and easements of the abutting owner or the right to the support of his soil, is, in the case under consideration, subject, by the very terms and conditions of the dedication or acquisition of the street, to the right of the public to bring it down for street purposes proper to such grade line as the public authorities shall first adopt."

The deeper reason is stated in the case in 4th New York, as follows:

"The opening of a street in a city is not necessarily an injury to the adjoining land-owners. On the contrary, it is in almost every instance a benefit to them. The damage which they sometimes sustain, because the level of the street does not correspond with the level of their land, is usually more than compensated by the increased value which the property acquires from having a new front on a street. In some instances the land-owner will suffer a heavy loss and in this case may, perhaps, be one of the number; but it is damnum absque injuria, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway; and he must bear the burden in the less common case of a depreciation in value in consequence of the work. It may be added, that when men buy and build in cities and villages, they usually take into consideration all those things which are likely to affect the value of their property and particularly what will probably be done by way of opening and grading streets and avenues."

The right in this case is statutory and a pending action, at whatever stage, falls with the statute. There is a marked difference between the creation of a new or cumulative remedy for an existing right and the creation of the right itself. That the repeal of a statute conferring jurisdiction or creating a right of action without a saving clause takes away all right to proceed, and that the repealed act will be considered as if it never existed except for the
143 purposes of those actions or suits which have been prosecuted and concluded while it was an existing law, has been so often stated in the books that it has become axiomatic. It is even held that a repeal after judgment, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to the higher court charged the appellate court with the duty of declaring the litigation ended without right of further prosecution.

"This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes

to pronounce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal."

Vance v. Rankin, 194 Ill. 625.

"* * * it is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after."

South Carolina v. Gaillard, 101 U. S. 433.

The cases in support of these rules are collected in Cooley, Const. Lim. (7th ed.) 544; 2 Sutherland, Stat. Constr. (2d ed.) 285; Endlich, Interpretation of Statutes, par. 479, and 22 Am. & Eng. Enc. Law, 745-752. As will be seen by reference to these authorities, the rule is applied by the courts in all cases where the right depends on the remedy, for the rule is universal that there is no vested right in a particular remedy unless the remedy is a part of the right itself.

It is contended that the case of Wooding v. Puget Sound National Bank, 11 Wash. 527, is not in point. But we are unable to distinguish it from the case at bar. It is further contended that the amendatory act of 1909 was passed in stealth and has resulted in a trick upon litigants. We cannot inquire into the motive of the legislature. It is enough that it had the power to repeal the old law, and exercised it.

This conclusion makes it unnecessary to discuss the other question raised by appellants. The judgment of the lower court is affirmed.

CHADWICK, *J.*

We concur:

RUDKIN, *J.*
FULLERTON, *J.*
GOSE, *J.*
MORRIS, *J.*

144 In the Supreme Court of the State of Washington.

No. 8379.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs and Appellants,

vs.

CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE and ST. PAUL RAILWAY COMPANY, of Washington, a Corporation, Defendants and Respondents.

Petition for Rehearing.

Comes now the appellants Manley Ettor and Mary T. Ettor, by their attorneys, Boyle, Warburton and Brockway and move the court for an order, granting a rehearing in this cause for the reasons and upon the grounds as follows:

1. The case is controlled by decisions of the United States Supreme Court, not before presented to this court.

2. Respondents are liable for the damage even though there had never been a statute giving compensation for damages resulting from an original grade. This point we do not find decided in the opinion filed.

3. Chapter 80, of Laws 1909, relied on by respondents is void even if it could be given a retroactive effect. This necessary point we do not find decided in the opinion filed.

Argument.

We believe if the court will read the cases referred to under our first head, it will feel bound in law, to grant a rehearing. The second and third grounds involve points necessary to a decision in favor of respondents, and are not touched on in the court's opinion.

In making these statements, counsel have due regard for the weight of a decision rendered after argument, and also for the statement of the court, that the point decided dispensed with the necessity of further discussion. The fault is ours in not finding all the cases at the time of the original hearing and in not making
145 our contention plain as to the second and third points.

Briefly reviewing the facts that the court understand our argument.

In the summer of 1906, the Ettors owned certain lots fronting on 26th street in what is now the Indian Addition to Tacoma, but was then under the sole jurisdiction of the county.

The Howards owned lots fronting on 26th street in what was then and is now, the Tacoma Land Company's 7th addition to the city of Tacoma. Said 26th street extended from the 7th addition on into Indian addition. The board of county commissioners at that time, passed a resolution, fully set forth in the record and briefs, looking to a possible future grading of 26th street by the defendant railway company, not only in the Indian addition, over which they had

control, but also in the 7th addition and in front of Howard's property, over which they had no control. Before anything was done under this order and resolution, and as appellants claim, before any grade whatever was authorized on 26th street, the Indian addition became a part of the city of Tacoma. Thereafter, the defendant railway company, acting under the direction of the city engineer, mayor, certain councilmen, etc., but without any charter steps looking to the establishment or building of a grade on 26th street, graded said street in front of both the Ettors and the Howards to their great damage. At that time, there was in force section 48, chapter 55 of laws of 1905, being the same as section 48, chapter 153, laws of 1907, and which was originally enacted in 1893, allowing compensation for an original grade.

The Ettors and the Howards sued to recover their damages, basing their claim partly on said statute, and partly on the failure to carry out charter requirements. Pending a determination of the suit, the legislature passed chapter 80, laws 1909, alleged to repeal the first mentioned statute.

I.

Decisions of the Supreme Court of the United States, un-
146 known to us at the time of the former argument, squarely decide that the change in the law affected by the alleged repeal of laws 1907, chapter 153, section 48, is a violation of the Federal Constitution, at least as applied to past transactions.

We must acknowledge ourselves remiss in not finding and presenting to the court for its aid, in our original briefs, all the law bearing on this case. We endeavored to make a thorough search, but owing perhaps to a turn in our mind, which did not agree with that of the digester, we failed to find the following determinative cases, construing and applying the Federal Constitution to an almost identical case. The cases referred to are:

Muhlker v. New York & Harlem R. R. Co. 197 U. S. 544, 49 Law Ed. 872.

Steamship Co. v. Joleffs, 2 Wall. 450;

Also Sauer v. City of New York, 206 U. S. 536, 51 Law Ed. 1176, where the doctrine of the Muhlker case is approved, but the case distinguished on the facts.

Considering first the facts to show that United States cases and this case are parallel.

As shown by the record and our briefs, the act of Congress authorizing the platting and sale of Indian addition, was subsequent in time to the original passage of the section re-enacted in laws 1907, chapter 153, section 48. The United States government platted the addition. Therefore, these plaintiffs must have bought while the section was in force.

Turning now to the United States cases. In 1882 and 1887, the supreme court of New York held that the light and air coming from a street, could not be taken from the adjacent property owner, by the construction of an elevated railroad, without compensation being

made therefor. Subsequently, one Muhlker acquired certain property fronting on a street. Thereafter, in compliance with a directory statute of New York, an elevated railroad was built in front of the property. In an action by Muhlker to recover for the
147 damage resulting from the obstruction of light and air, resulting, the supreme court of New York attempted to distinguish the earlier cases and held that he was not entitled to recover. Muhlker appealed to the supreme court of the United States, invoking the 14th amendment, and also the "contract" clause of that instrument. The supreme court held that the distinction made by the New York court was not sound, and that the refusal to Muhlker of his right to compensation, was in effect a reversal of the doctrine of the earlier cases and that this could not be done particularly where not only had the property been purchased, but the damage accrued before the reversal. The case is even stronger than ours, since the change in that case was only a change in judicial decisions. They are parallel.

1. In the Muhlker case, the city obtained the street by a deed "in trust nevertheless, that the same be appropriated and kept open as parts of public streets forever, in like manner as the other public streets and avenues are and of right ought to be."	1. In our case the city obtained the streets by a dedication of the same as a street, operating "to all intents and purposes as a quitclaim deed for the purposes intended by the donor." Ballingers's Code, Sec. 1276, Pierce's Code, Sec. 3556.
2. The property claimed to be injured was acquired while it was the law of the state that compensation must be made for consequential damages by the construction of an elevated railway in the street.	2. The property claimed to be injured was acquired while it was the law of the state that compensation must be made for consequential damages by an original grade in the street.
3. While this was still the law the property suffered consequential damage by the construction of an elevated road in the street.	3. While this was still the law, the property suffered consequential damage by the construction of an original grade in the street.
148 4. After the infliction of such damage the rule of law was changed.	4. After the infliction of such damage the rule of law was changed.

The supreme court of the United States (after some discussion as to whether or not the easement to light and air was in itself property), bases its decision as follows, the words in brackets being ours:

"However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases (this statute) were the law of New York, (Washington), and assured to him that his easements of light and air (right to compensation for an original grade) were secured by contract as expressed in those cases (such statute) and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

We are unable to see any possible distinction between this case and the Ettor case. Certainly a right growing out of a rule of law laid down by the courts of the state, and a subsequent damage falling within the rule is no more sacred, than a right growing out
149 of a statute, and a subsequent damage falling within the statute. And certainly the Federal Constitution is as applicable to the legislature as to the courts.

This decision has never been reversed. In the Sauer case, 206 U. S. 536, 51 Law Ed. 1176, the court recognized the doctrine, and refused to apply it only because the law of New York at the time of the purchase was found to be the same as the declaration of law which it was claimed impaired the obligation of the contract. If, therefore, the judicial determination of the effect on consequential damages of a prior dedication or condemnation, becomes a part of a contract of purchase, effected after such judicial determination, surely a legislative declaration as to the rights of parties after a dedication, made prior to such dedication, will become a part of a contract of purchase affected subsequent to the dedication and legislative enactment. We respectfully submit that as to the Ettor case, this court is bound by this decision of the supreme court of the United States.

In the Howard case, the facts so far as appear by the record, may be slightly different, but not so different, we believe, as to change the rule of the Muhlker case. When the pleadings in the Howard case were originally drawn, it was not anticipated that the statute would be changed or that the comparative date of its passage, and the acquirement of the property by plaintiff, would ever be drawn into the case. Consequently, we did not allege the date of purchase.

We think, however, that as against a demurrer, interposed almost the day of the passage of the only act which could be deemed to render such matter material, a court of justice, after the opportunity to amend is gone, may well assume that the property, situated in a city where every abstract shows a change of ownership within the last ten years, was in fact, purchased subsequent to 1893, the date of the original passage of the act giving compensation. If the Howard case should go off on this question of the alleged retroactive effect of chapter 80 of the laws of 1909, as determined by the date

of the purchase, a sustaining of the judgment on the ground that the date of the purchase is not alleged, would result in a miscarriage of justice on a technical point, a miscarriage easily avoided by taking judicial notice, or assuming in support of the com-
150 plaint that the purchase was made within the last sixteen years, and while the same law was in effect, that was in effect when the damage was done.

Be that as it may, we contend that the other supreme court case cited, is conclusive also of the Howard case. For while the opinion in the Muhlker case is not based on such ground, yet it has been in effect held, that the very grading of the street while a statute was in force, not only requiring compensation, but permitting it to be made after the doing of the damage, (Laws 1905, chapter 55, section 52; Laws 1907, chapter 153, section 53) creates a contract to pay for such damage. It is a universal principle that the law will presume an intention and agreement to perform that which the law declares ought to be performed.

If A enters upon the land of B and cuts down and removes his trees, the law will presume an agreement to pay their value, and B may waive the tort and sue in contract. Forms of pleading are in this state abolished, but the principle of the implied agreement still persists.

Thus in Steamship Co. v. Joleffe, 2 Wall. 450, Mr. Justice Field held that the repeal of a law authorizing a pilot to recover half pilotage from a vessel hailed, but which had rejected his services, did not and could not take away the right of action which had arisen before the repeal. It was the legal duty of the vessel to pay such half fees though the services were rejected, and the law will presume an agreement on its part to fulfil such duty. Such quasi contract the constitution will protect after the repeal of the statute. In our case, the law said, "on or after grading the street you must make compensation." The street was graded. Surely the law will presume a like intent and agreement to comply with its requirements.

So also it has been held by the Montana court that the right of action arising out of the cutting from public lands of trees less than eight inches in diameter, persists, though after the cutting, it was made lawful to cut such trees. The action might be considered as one in tort, or one in contract, but in any event, it vested by the doing of the act, and could not be taken away by the subsequent repeal of the statute. U. S. v. Williams, (Mont.) 19 Pac. 228.

151 Perhaps this doctrine is the true explanation of Graham v. C. M. & St. P. Ry. Co. (Wis.) 10 N. W. 609; Dash v. Van Cleeck (N. Y.) 5 Am. Dec. 291, and James v. Oakland Traction Co. (Cal. App.) 103 Pac. 1082, the first two of which were cited and discussed in our original briefs, and all of which hold that the repeal of a statute does not take away a right of action already accrued and which grew out of the statute. Certain it is that the United States Supreme Court will apply the doctrine if necessary to bring the case within the contract clause of the Federal constitution.

We conclude that the doctrine of the Joliffe case, 2 Wall. 450 controls both the Ettor case and the Howard case, and that the Muhlker

case, 197 U. S. 544, 49 Law Ed. 872, controls the Ettor case, and by fair intendment of the facts, rules the Howard case also.

II.

An affirmance of the judgment involves a holding that a city, or those purporting to act under it, may, without liability to abutting property owners, entirely disregard the charter limitations on the power of the city in regard to street grading, without incurring liability to abutting owners for resulting damage.

This has nothing to do with laws 1907, chapter 153, section 48. The charter provides that the city shall have power "by ordinance only" to grade streets, or establish grades, that the city council "shall by ordinance establish the grade of all streets," that there shall be a report to the council by the commissioner of public works; that there shall be a petition by the property owners, or a two-thirds vote of the council; that there shall be a notice of the improvement with a right to remonstrate. Charter of City of Tacoma, Section 52, subsec. 7, 185; 204; 205; *k*-35.

Appellants' counsel endeavored in their briefs to show that each defendant in the creation of the physical grade and cut herein question, knowingly and wilfully violated every provision of the charter of the city of Tacoma, touching street grades; that such violation deprived them of their protection, as a municipal corporation
152 or its agent and rendered them liable for the damages accruing to appellants from their acts, and that such liability was entirely independent of the statutes, and principles referred to in the court's opinion. (Assignment of Error No. 3 in Ettor case; Argument in Ettor opennig brief, pp. 67–79, inclusive, Ettor reply brief pp. 32–36 inclusive; Howard opening brief pp. 47–59 inclusive; Howard reply brief pp. 20–24 inclusive.) As to the fact of the violation of the city charter, there is no dispute. It is conceded that the grade was established and the work done on the "ipse dixit" of the city engineer, the mayor and certain councilmen without any action by the council whatsoever. And this in the face of express charter requirements that such action may be taken by ordinance "only."

As to the effect of such violation, there is however, a disagreement. Respondents in their briefs content:

1. That as to the Ettor property, the grading was authorized by the action of the board of county commissioners, before the property came into the city.

2. That inherently and by statute a city has power to grade its streets, and that therefore, the charter provisions expressly requiring that it shall be done by ordinance only, and after notice to the property owners, is so much waste paper.

Appellants on the other hand in their briefs contend:

1. That as to the Ettor case, the action of the board of county commissioners did not authorize any grading at all, and certainly did not authorize the particular grade built. This matter is fully taken up in the oral argument and briefs (Ettor opening brief pp. 21–33, Ettor reply brief pp. 1–12). The action of the board gave no

rights in 26th street, and at most left the matter of establishing the grade on annexation to the successors of the board, that is to the city council. But the city council never acted. As to the Howard case, it is conceded that the board's action could not affect the street in front of his property, and that the legal effect of the unauthorized action of the city and railroad company, must be determined
153 as though the board had never attempted to interfere.

2. That the charter requirements are valid and mean just what their language imports, and constitute a limitation on the power of the city to grade its streets. This might possibly be exercised in any manner which the city saw fit. This seems so axiomatic that we did not quote authorities in our brief and now content ourselves with quoting the language of this court: "The mode prescribed is the measure of authority."

3. That whenever a municipality, or any one purporting to act for a municipality or in the streets of a municipality undertakes to change the grade of a street contrary to such limitations, whether such grade be an original or a regrade, and in so acting, goes beyond or contrary to the express or implied limitations of the charter, it loses the protection which otherwise covers it as one exercising a governmental power in a lawful manner. We admit what this court said in its opinion and also in the Fletcher case; that by dedication, a property owner consents to the future grading of the street, even to his damage in the absence of statute, provided, always, that such grading be in a lawful manner. But where the grading is unlawful or in excess of the city's powers, the person or city doing such grading, must answer for the resulting damages. This liability depends, not upon the reasonableness or unreasonableness of the grade per se, nor upon whether the city might or might not have reached the same result had it kept within the bounds of its power, but upon two facts which invariably result in liability:

1. An injury to another;
2. No lawful power to inflict such injury.

In support of this principle, we cited and analyzed a large number of authorities from many jurisdictions. (Ettor opening brief pp. 71–77; Howard opening brief, pp. 51–57.) We also distinguished the one case cited by respondents, in that in such case, as therein pointed out, the city was acting within the bounds of its power. (Ettor reply brief, bottom p. 33 and all of p. 34; Howard reply brief, bottom p. 21 and all p. 22.) We do not care to here renew or
154 reiterate such discussion of authorities. But we do wish to urge that the gist of such decisions is logically and necessarily true.

1. The city in grading the street without following charter limitations proceeded beyond its power.
2. The city in grading the street, injured a property owner.
3. The city and those acting with or under it, is liable.

Now, it is evident that

1. This question has nothing to do with the acts of 1907 or 1909, and was not passed upon in the opinion filed.
2. An affirmance of the judgment constitutes

a. A disregard and refusal to follow the principles and authorities above set forth.

b. An affirmance of the right of any petty city officer or person or corporation, purporting to act under him (the defendant railroad company in this instance) to utterly ruin any property owner, by grading and cutting, leaving the property owner without redress unless he can accomplish the impossible and show what a legislative body, the council, would have done had the matter been properly and legally presented to them.

We do not believe that it was the intention of this court to sanction any such rule, and therefore, request a rehearing that an opinion may be rendered upon the question involved.

III.

Laws 1909, Chapter 80, being the so-called repealing statute is unconstitutional, aside from its retroactive effect, and cannot therefore affect laws 1905, chapter 55, section 47, laws 1907, chapter 153, section 48, on which we partly rely.

We endeavored to raise and present this point by assignment — error No. 4 in the Ettor case, and by argument (Ettor opening brief, pp. 43 to 48, Howard opening brief, pp. 23 to 28). It is necessary to decision of the case and does not depend on the unconstitutionality of the act as opposed to the constitutional provisions dealing with retroactive laws. It is not passed on by the
155 court in the opinion filed, which assumes the validity of the so called repealing act unless invalid on the ground of being retroactive. We conclude that we did not make our argument plain. Endeavoring to rectify such mistake and proceeding by syllogisms.

Syllogism I.

1. Our constitution is plain on this point. Before property can be "damaged," compensation must be made.

2. It is equally plain under the decision of the court that damage resulting from a regrade of street, after improvements thereon is "damage" within the meaning of the constitutional prohibition. Brown v. Seattle, 5 Wash. 35 on p. 40.

3. Therefore, any statute which attempts to authorize such damage by regrade, before compensation, is unconstitutional.

Syllogism II

1. Act 1909, chapter 80, by its language does two things only. It authorizes a city in case of a change of grade to

a. Pay for damages resulting therefrom under the eminent domain proceedings elsewhere outlined in the act.

b. To pay for damages resulting from a change in grade by

assessment to be raised as the other costs of the work, that is by money to be raised and paid after the damage has been done.

2. The first option given by the language of the section (that is to follow out the eminent domain proceedings in case of a regrade) is already covered by sections one and two of the act of which it is an amendment (Laws 1905, chapter 55, p. 84, Laws 1907, chapter 153, p. 316) which provides that the city may "damage any property—for the purpose of making changes in the grade of any street—after just compensation having first been made—in the manner prescribed by this act."

3. Therefore the only effect of section 80 of the laws of 1909 was to attempt to authorize a city in case of damages resulting from a change of grade, to do the damage first, and pay for it afterwards.

Syllogism III, Combining I and II.

1. Any statute which attempts to authorize damages to
156 abutting property by a change of grade, before making compensation, is unconstitutional.

2. The only effect of chapter 80 of the laws of 1909, was to attempt to authorize a city to damage abutting property by a change of grade without first making compensation therefor.

3. Therefore, chapter 80 of the laws of 1909 is unconstitutional.

Syllogism IV, Applying Syllogism III.

1. "An amending act which is unconstitutional and void, does not, being a nullity, in any way affect the validity of the act amended. Especially is this true where the amendment is by implication, or the repealing clause is general, applying only to acts or parts of acts inconsistent with the amendatory statute."

Quotation from Am. & Eng. Enc. of Law, Vol. 26, p. 712.
In re Nolan 21 Wash. 395.

2. Chapter 80 of the laws of 1909, alleged to amend section 47 of chapter 55 of laws 1905, section 48 of chapter 153 of laws 1907, said sections so alleged to be amended, being the ones on which we partly rely, does not expressly repeal or amend such sections and is unconstitutional.

3. Therefore, section 47 of chapter 55 of laws 1905, section 48 of chapter 153 of laws of 1907 are not in any way affected by chapter 80 of the laws of 1909 on which defendants rely.

Conclusion.

We, therefore, respectfully ask a rehearing of both the Ettor case and the Howard case on the three grounds first set forth.

1. The case is controlled by decisions of the United States Supreme Court.

2. Respondents are liable for the damage even though there had never been a statute giving compensation for damages resulting from an original grade.

3. Chapter 80 of Laws 1909, relied on by respondents is
157 void even if it could be given a retroactive effect.

Respectfully submitted,

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

Indorsed: Filed Feb. 16 1910. C. S. Reinhart, Clerk.

158 No. 8379.

Department One.

Filed Mar. 26th, 1910.

MANLEY ETTOR and WIFE, Appellants,
v.
CITY OF TACOMA and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondents.

On Petition for Rehearing.

Per Curiam:

We are asked to reverse our former holding in this case (15 Wash. Dec. 1), appellants claiming that this case is controlled by certain decisions of the Supreme Court of the United States not heretofore called to our attention, viz: Muhlker v. N. Y. & Harlem R. Co., 197 U. S. 544; Steamship Company v. Joliffe, 2 Wall. 450, and Sauer v. City of New York, 206 U. S. 536. Under these authorities appellants insist that respondents are liable for the damages claimed, even though there had never been a statute giving compensation for damages resulting from an original grade, and that chapter 80 of the laws of 1909 is void even if it could be given a retroactive effect. The Muhlker case grew out of a condition theretofore unknown to the courts of this country. It had been held by the supreme court of New York that light and air coming from a street could not be taken from the adjacent property owner without compensation by an elevated railroad company. Subsequently one Muhlker acquired certain property fronting on a street over which the track of the railway was constructed. It was laid on or below the grade of the street, but by an act of the legislature the company was authorized to change it to an elevated road. The company claimed immunity from damages under its original grant of a right of way, and the subsequent act of the legislature. The state court held with the company. This judgment was reversed by the supreme court of the United States. Counsel emphasizes that part of the decision wherein it is said:

"Hence the importance of the Elevated Railroad cases and
159 the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial ad-

vantages between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

Reference to the Muhlker case and the New York cases referred to therein shows that the distinction between an original use and an inconsistent street use or added servitude was considered by the court. The court expressly calls attention to the fundamental error of the state court, saying: "* * * the court concluded that it was the state, not the railroads, which did the injury to plaintiff's property," and ordered a reversal because it found the fact to be otherwise.

But if, as counsel contend, the supreme court of the United States has held that the legislature having once spoken so fixes property right that it cannot thereafter legislate, or if a court is bound willy nilly by a previous decision upon a subject left open by the constitution, the decision is not sound. For no citizen has the constitutional right to insist that courts shall not reverse their decisions upon matters of property rights, or that legislative assemblies shall not change existing statutes when his right of recovery depends solely upon the decision or statute, and his only reason is that he will thereby suffer a pecuniary loss. If it were so, the state as well as its municipalities would be helpless to exercise its primary right of sovereignty over established highways and be subject to what Mr. Justice Holmes, in his dissenting opinion, has been pleased to call "the parasitic right" of the property owner. As we have shown in our first opinion, an original grade is not a taking or damaging within the meaning of the constitution, whereas an added servitude, as an elevated railroad obstructing light and air, or, as has been held in this state, a regrade, is.

In the Sauer case the distinction between the position of appellants and that assumed by the respondents is clearly pointed out. After quoting from the New York cases, the court said:

160 "It would be difficult for words to show more clearly, than those quoted from the opinions [New York Cases] that such a case, as that now before us, was not within the scope of the decisions or of the reasons upon which they were founded. The difference between a structure erected for the exclusive use of a railroad and one erected for the general use of the public was sharply defined. It was only the former which the court had in view. That the structure was elevated, and for that reason affected access, light and air, was an important element in the decisions, but it was not the only essential element. The structures in these cases were held to violate the land owners' rights, not only because they were elevated and thereby obstructed access, light and air, but also because they were designed for the exclusive and permanent use of private corporations. The limitation of the scope of the decision to such structures, erected for such purposes, appears not only in the decisions themselves but quite clearly from subsequent decisions of the Court of Appeals."

In none of these cases was the right of a city to make an original grade of its streets involved, nor was the right of the legislature to abridge or abrogate a right given by statute considered or ques-

tioned. The point we have to consider here, and the governing rule of law, is made plain in the concurring opinion of Mr. Justice Bradley, in Louisiana v. Mayor of New Orleans, 109 U. S. 291. He says:

"I concur in the judgment in this case, on the special ground that remedies against municipal bodies for damages caused by mobs, or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall, or shall not, indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall, or shall not, do so, is a matter of legislative discretion; just as it is whether the public shall, or shall not, indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion. And, as the judgments in the present case were founded upon a law giving this kind of remedy, I agree with the court, that any restraint of taxation which may affect the means of enforcing them is within the constitutional power of the legislature. Until the claim is reduced to possession, it is subject to legislative regulation."

Of this decision Justice Harlan said, in the dissenting opinion in Freeland v. Williams, 131 U. S. 421, 423:

"The radical differences between that and the present case is, that the right to sue the city of New Orleans for damages on account of private property destroyed by a mob was given by statute; whereas, the right to claim compensation from a wrongdoer for his illegal conversion of private property to his own use is inherent in the owner, and cannot be taken from him by the state."

In Steamship Company v. Joliffe, a claim arose under the pilotage law of California. After a right of action had accrued, the statute upon which it was founded was repealed. The court said:

161 "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

This is the undoubted rule as between individuals when rights have accrued under contract or quasi contract, but it has never been extended so as to preserve a right of action against the public when that right is not based upon contract, but is asserted because it accrued at a time when the right of sovereignty was temporarily surrendered. A case involving the same principle was before the supreme court of Oregon.

Ladd v. City of Portland, 32 Ore. 271.

Under an original charter a city was authorized to improve streets at the expense of abutting property owners, but it was provided that, when a street "has been improved under and by virtue of the provisions of this chapter, thereafter such street or part thereof shall not be subject to be again improved, but may be repaired." Thereafter the city was consolidated with others, and a new charter was passed, "all vested rights being reserved." Thereafter the council proceeded to, and did, improve the street and assessed the cost to the abutting property. An action was brought to restrain the collection of the tax, the contract clause of the federal constitution being invoked. The court held:

"The Supreme Court of the United States, in interpreting the clause of the constitution now under consideration, has always taken the terms thereof in their ordinary meaning, and holds that the word 'contract,' as used therein, means a voluntary agreement of minds, upon a sufficient consideration, to do or not to do certain things: Murray v. Charleston, 96 U. S. 432; Louisiana v. Mayor, etc., of New Orleans, 109 U. S. 285 (3 Sup. Ct. 211); Fisk v. Jefferson Police Jury, 116 U. S. 131 (6 Sup. Ct. 329). And in our opinion the legislation in question has none of the essential ingredients of such a contract. The power to assess the costs of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations; but it is 'never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms': Philadelphia Railroad Company v. Maryland, 51 U. S. (10 How.) 394. And even then, if the exemption is not supported by some consideration, it may be revoked at any time: Rector, etc., of Christ Church v. County of Philadelphia, 65 U. S. (24 How.) 300. * * * The manifest purpose of the provision of the charter under consideration was to define the mode and extent of the power of the council in the matter of street improvements, and the limitation on the exercise of
162 such power was a mere concession to the citizen, and an act of grace, and not a contract by which the state forever relinquishes the sovereign power of taxation. It was a limitation voluntarily imposed by the legislature upon the powers of the city, which that department of the state government could remove at any time public policy or the interests of the municipality might seem to demand, and bound the state only so long as the statute remained unrepealed."

The further point is made that we have not considered the objection that the city can only grade streets under the terms of an ordinance, and that it has not done so in this case. It is possible that appellants could have enjoined the improvement now complained of, but they did not see fit to do so. They allowed the work to be done and now ask damages. The city has defended this action upon the theory that the work was done within the limits of its authority. This is an admission on the part of appellants of the right of the city, and on the other hand the city would be estopped

to set up the informality of antecedent proceedings, for damages could only be allowed on the theory that the street work is permanent and is to remain as a menace or depreciating influence upon appellants' property.

It is also urged that we assume the constitutionality of the act of 1909, without discussing the theory of appellants in opposition thereto. Counsel's whole argument in this behalf is based upon the premise that his property is "taken or damaged." Having said in the first opinion that it was not so taken or damaged, we then considered and now hold that the act of 1909 in no way offends against the constitution, and is not for that or any of the reasons suggested by appellants to be held void.

It follows that the constitutional rights of appellants were not infringed by the act of the city, neither under the contract clause of the federal constitution nor the fourteenth amendment thereto.

163 In the Supreme Court, State of Washington.

TUESDAY, *March* 29, 1910.

No. 8379.

MANLEY ETTOR and WIFE, Appellants,
vs.
CITY OF TACOMA and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondents.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Pierce county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now on this 29th day of March, A. D. 1910, on motion of T. L. Stiles, Esquire, of counsel for respondents, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed, with costs, petition for rehearing denied, and that the said City of Tacoma and the Chicago, Milwaukee & St. Paul Railway Co. have and recover of and from the said Manley Ettor and wife, and from the United Surety Company, surety, the costs of this action taxed and allowed Seventy-eight & 00/100 dollars, and it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

164 In the Supreme Court of the State of Washington.

No. 8379.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Washington:

Your petitioners, the above named appellants considering themselves aggrieved by the final judgment and decision of the above entitled court in the above entitled course, affirming the judgment of the superior court, dismissing appellants' action with costs and believing that said judgment and decision is erroneous for the reasons specified in the attached assignment of errors filed herewith, that the said appellants and each of them now pray a writ of error to the above entitled court from the Supreme Court of the United States and ask that the amount of the supersedeas bond be fixed.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

EARL B. BROCKWAY.

165 In the Supreme Court of the State of Washington.

No. 8379.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Assignment of Errors and Prayer for Reversal.

Now come the above named appellants and each of them and file herewith their petition for a writ of error and say that there are errors in the record, proceedings and judgment in the above entitled cause and in the denial of appellants' petition for rehearing of said cause, and for the purpose of having the same reversed in the United States Supreme Court, make the following assignments of error:

1. The Supreme Court of the State of Washington erred in denying the claim set up by appellants that the right to receive compensation, accruing to appellants under and by virtue of the laws

of 1907, chapter 153, and particularly sections 1, 2 and 48 thereof, said statute being a continuation of the laws of 1893, chapter 84, and said right to receive compensation being for injuries resulting to appellants' abutting and adjacent property by reason of the grading by respondents of East 26th street in the city of Tacoma, which adjoined their premises, was a vested and accrued right, falling within the protection and immunity granted by the 14th amendment of the constitution of the United States, and not therefore subject to be divested by the passage of the laws of 1909, chapter 80, said statute being passed subsequent to the damage complained of and to the institution of an action against respondents to recover therefor.

2. The supreme court of the state of Washington erred in denying the claims specially set up by appellants under and by
166 virtue of Article 1, section 10, of the Constitution of the United States to full and complete immunity from the operation and effect of the laws of the state of Washington for 1909, chapter 80, as applied to the right of appellants to receive compensation for injuries resulting to their property by the establishment and construction by respondents of an original grade in 26th street, adjoining their premises, which right to compensation accrued to appellants by virtue of the laws of the state of Washington for 1907, chapter 153, being a continuation of the laws of 1893, chapter 84, and in effect when appellants purchased their property and when the damage to such property accrued by the establishment of such grade. The court erred in that the ruling just referred to and the effect so given the laws of the state of Washington for 1909, chapter 80, gave such statute effect as a law impairing the obligation of contracts and that in so far as this is a proper construction of said law of 1909, it is opposed to said Article 1, section 10, of the Constitution of the United States.

3. The supreme court of the state of Washington erred in denying the claims specially set up by appellants under and by virtue of section 1, article 14, of the amendments to the Constitution of the United States to have their case determined and their right to compensation adjudicated, without reference to the laws of the state of Washington, for 1909, chapter 80, which statute was passed subsequent to the accrual of appellants' right to compensation, growing out of damage to their property by grading by respondents of East 26th street in the city of Tacoma, Washington, and which statute was construed by the said supreme court to repeal laws of the state of Washington, 1907, chapter 153, section 48, being a continuation of the laws of 1893, chapter 84, and which was in force and effect when said damage accrued and which forbade respondents to grade any street to the damage of abutting property owners, without making compensation therefor, and which said laws of 1909, chapter 80, was further construed by the supreme court of the state
167 of Washington, as intended and operative to defeat any right to compensation accrued at the time of its enactment under said laws of 1907 and 1893. By such ruling and decision, the supreme court of the state of Washington deprived these appellants

of property, without due process of law and by such decision and ruling, the supreme court of the state of Washington permitted and caused the appellants to be deprived of their property without due process of law by said chapter 80 of the laws of the state of Washington for 1909.

4. The supreme court of the state of Washington erred in holding that though the appellants might have enjoined the respondents from the grading of East 26th street in the city of Tacoma, to the damage of their abutting property, since there had never been the passage of any ordinance, authorizing said grading as by the charter of the city of Tacoma required, yet not having so enjoined said work, they could not recover damages from either of said respondents on the ground that said work of grading was not so authorized by ordinance.

5. The supreme court of the state of Washington erred in affirming the judgment of the lower court and in denying appellants' petition for a rehearing.

6. The supreme court of the state of Washington erred in holding that appellants' right to compensation for injuries to their property by the grading by respondents of East 26th street in Tacoma, Washington, which street adjoined said property, which right to compensation arose out of laws of 1907, chapter 153, being a continuation of the laws of 1893, chapter 84, was not a vested right and for that reason only was not protected from the operation of the laws of 1909, chapter 80, either under the 14th amendment of the Constitution of the United States, or under article 1, section 3, of the constitution of the state of Washington.

7. The supreme court of the state of Washington erred in
168 holding that appellants' property was not "taken or damaged" either by the grading by respondents of East Twenty-sixth street in the city of Tacoma, Washington, or by the deprivation of their accrued right to compensation therefor, which deprivation was affected through the laws of the state of Washington for 1909, chapter 80, and the construction thereof by the courts.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

EARLE B. BROCKWAY.

Prayer for Reversal.

For the above and foregoing errors, the appellants Manley Ettor and Mary T. Ettor, his wife pray that the said judgment of the supreme court of the state of Washington, entered March 29, 1910, and that said order of the supreme court of the state of Washington, denying appellants' petition for rehearing entered M'ch 29, 1910, and the opinion on which was filed March 26, 1910, be reversed, and the judgment rendered in favor of appellants (the plaintiffs below) and for costs.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

EARLE B. BROCKWAY.

Indorsed: No. 8379. In the Supreme Court of the State of Washington. Manley Ettor and Mary T. Ettor, his wife, Appellants, vs. City of Tacoma, a Municipal Corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Respondents. Petition for Writ of Error. Filed Mar. 31, 1910. C. S. Reinhart, Clerk. Boyle, Warburton & Brockway, Attorneys for Appellants, #310 Fidelity Building, Tacoma, Washington.

169 In the Supreme Court of the State of Washington.

No. 8379.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation Respondents.

Order Allowing Writ of Error.

Upon reading the petition of Manley Ettor and Mary T. Ettor, his wife, appellants in the above entitled cause, for the allowance of a writ of error to remove said case to the supreme Court of the United States;

It appearing to my satisfaction that on the 29 day of March, 1910, the final judgment was made and entered by the supreme court of the state of Washington, in the above cause and that on the 29 day of March, 1910, an order was made and entered, denying appellants' petition for a re-hearing of said cause; that the said court is the highest court of the state of Washington, in which a decision in said suit could be had; that in said cause, petitioners and appellants in said cause specially set up and claim a title, right, privilege and immunity under the first section of the 14th amendment to the constitution of the United States and also under the tenth section of the first article of the constitution of the United States, and that the decision in said supreme court of the state of Washington, is against the title, right, privilege and immunity so specially set up and claimed and that in said cause *it* was drawn in question the validity of chapter 80 of the laws of the state of Washington, for 1909, on the ground that said statute is repugnant to the first section of the 14th amendment to the constitution of the United States and also repugnant to the tenth section of the first article to the constitution of the United States and the decision of the
170 supreme court of the state of Washington was in favor of the validity of said statute of the state of Washington.

It is ordered, that the writ of error to remove said cause to the supreme court of the United States issue and that in said writ Manley Ettor and Mary T. Ettor shall be named as plaintiffs in error and the city of Tacoma, a Municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation,

shall be named as defendants in error. Said writ shall issue upon plaintiffs in error filing bond in the sum of five hundred dollars ($500.00) conditioned, that they will prosecute their writ to effect and if they fail to make their plea good, shall answer costs and damages. Said bond when approved and said writ, shall operate as a supersedeas.

Dated at Olympia, Washington, this 31 day of March, 1910.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: No. 8379. Filed Mar. 31, 1910. C. S. Reinhart, Clerk. Order Allowing Writ of Error.

171 In the Supreme Court of the United States.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs in Error,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants in Error.

Bond.

Know all Men by These Presents, that we, Manley Ettor and Mary T. Ettor, as principals, and National Surety Company a corporation, organized and existing under and by virtue of the laws of the state of New York, and duly qualified and authorized to transact the business of a surety company in the state of Washington, as surety, are held and firmly bound unto the said city of Tacoma, a municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, in the sum of five hundred dollars ($500.00) to be paid to the said city of Tacoma, a municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, their executors administrators and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Signed, and sealed this 31st day of March, 1910.

Whereas lately at a session of the supreme court of the State of Washington, in a suit pending in said court, between the above named plaintiffs in error and the above named defendants in error, final judgment was rendered against the said plaintiffs in error and the said above named plaintiffs in error, having obtained a writ of error from the Supreme Court of the United States and filed a copy thereof with the clerk of said court to reverse said judgment,

Now, therefore, the condition of this obligation is such that if the said Manley Ettor and Mary T. Ettor, shall prosecute
172 their said writ of error to effect, and if they shall fail to make their plea good, shall answer all damages and costs that may

be adjudged then this obligation be void, otherwise, to remain in full force and effect.

MANLEY ETTOR,
MARY T. ETTOR,
By BOYLE, WARBURTON & BROCKWAY,
EARLE B. BROCKWAY,
Their Attorneys.

[SEAL.] NATIONAL SURETY COMPANY.
By CHARLES O. BATES,
Resident Vice President,
By W. H. OPIE, *Resident Assistant Sec'y.*

(Bond.)

Bond approved and to operate as supersedeas.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: 8379. Filed Mar. 31, 1910. C. S. Reinhart, Clerk. Bond.

173 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Manley Ettor and Mary T. Ettor, his wife, and City of Tacoma, a Municipal Corporation and the Chicago, Milwaukee & St. Paul Railway Company, a Corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Manley Ettor and Mary T. Ettor, his wife, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and

openly, you send the record and proceedings aforesaid, with
174 all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty (60) days, from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, — Justice of the United States, the 1st day of April in the year of our Lord one thousand nine hundred and ten.

[Seal of the United States Circuit Court Western District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, Western District of Washington.
By SAM'L D. BRIDGES,
Deputy Clerk.

Allowed to operate as a supersedeas, by

____ ____,
Chief Justice of the Supreme Court of the State of Washington.

175 [Endorsed:] 8379. Filed Apr. 2, 1910. C. S. Reinhart, Clerk.

176 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to City of Tacoma, a Municipal Corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Washington, wherein Manley Ettor and Mary T. Ettor, are plaintiffs in error and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Rudkin, Chief Justice of the Supreme Court of the State of Washington, this 14 day of April, A. D. 1910.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

[Seal of the Supreme Court, State of Washington.]

Attest:

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

177 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation on the therein-named City of Tacoma a municipal corporation, by handing to and leaving a true and correct copy thereof with T. L. Stiles attorney of record for defendant in Error City of Tacoma personally at Tacoma in said District on the 14th day of April, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal,
By I. S. DAVISSON, *Deputy.*

Marshal's fees $2.06.

178 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexeed Citation on the therein-named Chicago, Milwaukee and St. Paul Railway Company a corporation by handing to and leaving a true and correct copy thereof with Herbert S. Griggs, attorney of record for defendant in error Chicago. Milwaukee & St. Paul Railway Company personally at Tacoma in said District on the 14th day of April, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal,
By I. S. DAVISSON, *Deputy.*

Marshal's fees 2.06.

179 [Endorsed:] 8379. Filed Apr. 27, 1910. C. S. Reinhart, Clerk. U. S. Marshal's Civil Docket No. 3343.

180 In the Supreme Court of the State of Washington.

MANLEY ETTOR and MARY T. ETTOR, His Wife, Plaintiffs and Appellants,

vs.

CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants and Respondents.

Certificate.

I, Frank H. Rudkin, Chief Justice of the Supreme Court of the state of Washington, do hereby certify that this suit was brought by the appellants Manley Ettor and wife, to recover for damages claimed

to have been caused to their property situated on East 26th street in the city of Tacoma, a city of the first class, by an original street grade of said 26th street by the defendant, the Chicago, Milwaukee & St. Paul Railway Company, alleged to have been acting in connection with and under purported authority of the other defendant, the city of Tacoma; that at the time said grading was done, there was in force and effect in the state of Washington, Section 48, Chapter 153 of the Laws of 1907, which section was a re-enactment of identical sections in prior laws which had been in effect since 1893; that this section had been interpreted by this supreme court as giving a right of compensation to property owners, whose property had been injured by the original grading of a street, by or under the authority of a city of the first class, and did give such right. Appellants as one of the grounds of recovery, relied on said section and the said interpretation thereof by this court. After the commencement of the action and prior to the rendition of the judgment, the legislature of the state of Washington enacted Chapter 80 of the Laws of 1909. Defendants Chicago, Milwaukee & St. Paul Railway Company, and the city of Tacoma each contended in this court, that the right to compensation given by section 48, chapter 153 of the Laws of 1907 and prior identical laws, was taken away and
181 destroyed by Chapter 80 of the Laws of 1909 not only as to subsequent damages, but as to damages which had accrued at the time of the enactment of said Chapter 80, and for which suit had been commenced at the time of the enactment of said Chapter 80.

Plaintiffs being appellants in this court, contended in this court, that their right to compensation was a vested and accrueed right at the time of the enactment of Chapter 80 of the Laws of 1909, and that to give such statute a construction which would deprive them of such right to compensation, would be in effect a deprivation of property without due process of law and in violation of the 14th amendment to the constitution of the United States.

Plaintiffs being appellants in this court further contended in this court, that the record showed that they had purchased the property while Chapter 153 of the Laws of 1907 or prior identical laws were in force and effect; that their right to recover compensation for injuries by an original grade under such statute was in effect, a contractual right of which the legislature could not deprive them and that any attempt by the state legislature or the court to deprive them of such right after they had purchased, was in violation of Article 1, section 10 of the Constitution of the United States, forbidding any state to by law impair the obligation of a contract.

This court refused to sustain either of the contentions of plaintiffs, appellants in this court, and held that the right to compensation granted by Section 48, chapter 153 of the laws of 1907, was not a vested right, but was subject to legislative change after the damage complained of and before judgment. This court further held that Article 1 of section 10 of the Federal constitution did not govern a right to compensation for injury to property by an original street grade, when such right to compensation arose solely out of a statute

in effect at the time the property was purchased. The determination of the case by this court in favor of respondents and against the plaintiffs and appellants, is based upon the two holdings above set forth.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: 8379. Filed May 5 1910. C. S. Reinhart, Clerk.

182 In the Supreme Court of the State of Washington.

No. 8379.

MANLEY ETTOR and WIFE, Appellants,
v.
CITY OF TACOMA et al., Respondents.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause. And, in pursuance of the Writ of Error heretofore filed in this cause, I now transmit the same, together with the original Writ of Error and the original Citation, to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Olympia, this 12th day of May, 1910.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: File No. 22,211. Washington Supreme Court. Term No. 68. Manley Ettor and Mary T. Ettor, his wife, plaintiffs in error, vs. City of Tacoma and Chicago, Milwaukee & St. Paul Railway Company. Filed June 2d, 1910. File No. 22,211.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 68.

MANLEY ETTOR AND MARY T. ETTOR,
PLAINTIFFS IN ERROR,

vs.

CITY OF TACOMA, A MUNICIPAL CORPORATION, AND THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF PLAINTIFFS IN ERROR.

S. WARBURTON,
JOHN M. BOYLE,
E. B. BROCKWAY,
C. M. BOYLE,
Attorneys for Plaintiffs in Error.

No. 22,211

SUBJECT INDEX.

LIST OF CASES REFERRED TO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 68.

MANLEY ETTOR AND MARY T. ETTOR,
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vs.

CITY OF TACOMA, A MUNICIPAL CORPORATION, AND THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF PLAINTIFFS IN ERROR.

Statement.

In the year 1893 the State of Washington passed an eminent-domain act, relating to cities of the first class, which provided in section one that "Every city of the first class is hereby authorized and empowered to condemn land and

property" for streets or for street improvements, "and to *damage* any land or other property for any such purpose, or for the purpose of making changes in the grade of any street * * * and to condemn land and other property and to damage the same for any public use within the authority of such city after just compensation having been *first* made or paid into court for the owner in the manner prescribed by this act."

Section 2 provided "When the corporate authorities of any such city shall desire to condemn land or other property, *or damage the same for any purpose authorized by this act*, such city shall provide therefor by ordinance," etc. Following this are detailed provisions for the exercise by the city of the right of eminent domain, in such cases, for the payment of the damages by the city before doing the damage and the raising of the money by special assessments to recompense the city for the payment of such awards. All of these provisions, however, down to section 47, contemplate the payment of the award before the taking or damaging of the property.

Section 47, concerning which, and its alleged repeal, this case centers, reads as follows:

> "If any street, avenue or alley, or the right to use and control the same for purposes of public travel, shall belong to any city, and such city shall establish a grade therefor, which grade requires any cut or fill, damaging abutting property, the damages to arise from the making of such grade may be ascertained in the manner provided in this act, but such city may provide that the compensation to be made for such damage, together with the accruing costs, shall be added to the cost of the labor and material necessary for the grading thereof, and shall be paid by assessment upon the property within the local assessment district defined by law or the charter or ordinances of such city in the same manner and to the same extent as other expenses of such improvement are assessed and collected. In such case it shall not be necessary to procure the appointment of com-

missioners or take the other proceedings herein provided for making such assessments, but all the proceedings for the assessment and collection of such damages and costs, shall, if so ordained by such city, be governed by the charter provisions, law or ordinances in force in such city for the assessment and collection of the cost of such improvements upon property locally benefited thereby: *Provided, however,* That this section shall apply only to the *original* grading of such street, avenue or alley."

It will be noticed that this section authorizes the city to damage abutting property by an *original* grade, but requires it to be accompanied by one of two acts:

First. The city may proceed by eminent domain, and pay the compensation before doing the damage, or

Second. The city may include the damage in the general cost of the work, to be paid for as the rest of the work is paid for, in which event, under the laws as to street improvements and payment therefor by special assessment, the payment would not be made until the damage was done.

Laws of Wash., 1893, CLXXXIV, sections 1-47, pp. 189-207.

This statute, with amendments not material to this discussion, was continued as the law of the State through Ballinger's Code, sections 775-821; Laws of Wash., 1905, c. 55, sections 1-48, pp. 84-101, and Laws of Wash., 1907, c. 153, sections 1-48, pp. 316-336.

In 1896 the Puyallup Indian Commission, under the authority of U. S. Stat. at Large, vol. 27, chap. 209, p. 633, which became a law March 3, 1893, laid out and platted the Indian addition "as an addition to the city of Tacoma." In 1896, under the authority of U. S. Stat. at Large, vol. 27, chap. 209, p. 633, Manley Ettor, the plaintiff below, and plaintiff in error here, purchased lots eight (8) and nine

(9) of block 7639, fronting on 26th street of said addition, from or through said Indian Commission.

Plaintiff's Exhibit, Printed Record, p. 73.

This addition did not actually become a part of the city of Tacoma until August 19, 1907 (Printed Record, pp. 3, 10, 18), and until that time the roads or streets therein contained were subject to the jurisdiction of the county commissioners of Pierce county, Washington, in which the addition was situated.

In October, 1906, the defendant, the Chicago, Milwaukee and St. Paul Railway Company, desiring for its own purposes a vacation of "M" and "N" streets, within said addition, petitioned said board for an order vacating such streets. On October 31, 1906, the board passed an order vacating said streets "subject to the following terms and conditions":

> "1. That the said Chicago, Milwaukee & St. Paul Railway Co., its successors and assigns, shall, before this order of vacation becomes operative, at its, or their own expense, and without cost or charges to or upon the said county of Pierce, improve 26th street between East "L" street and Bay street, in Indian addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory roadway thirty feet in width along the center of said 26th street, between said limits, and by laying and constructing a good and sufficient plank sidewalk on one side of said South 26th street, *as directed by the said board of county commissioners of Pierce county*, from said East "L" street to East "P" street, in said Indian addition.
>
> "The work and improvement shall be *done upon order of the said board of county commissioners, and according to plans prepared or approved by the* said board or the county surveyor of said Pierce county, and to the satisfaction and approval of the said board of county commissioners of Pierce county, and shall in any event be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or

take exclusive possession of said vacated portions of "M" and "N" streets, and shall be done within *ninety days after being notified by said* board to do said work and improve said street.

"2. The said Chicago, Milwaukee & St. Paul Railway Company, its successors and assigns, shall pay all damages which the county of Pierce may become liable for resulting to any person, persons, firm or corporation, or property, by reason of such vacation, and the said railway company, its successors and assigns shall forever hold the said county of Pierce harmless from all such claims and damages.

"3. Upon the failure of the said Chicago, Milwaukee & St. Paul Railway Company, its successors and assigns, to comply with all of the above terms and conditions, the said vacation shall become null and void and of no force and effect."

Plaintiffs' Exhibits A and B, Printed Record, pp. 68-69, 70-71.

Afterwards it became certain that the Indian addition would be regularly and duly annexed to the city of Tacoma and become subject to its jurisdiction, and pass out of the jurisdiction of the board of county commissioners. While matters were in this state the engineer of the company submitted to the county engineer a profile of the grading which the company proposed to do on 26th street for the vacation which had been promised it when the grading had been accomplished (Record, p. 32). This profile called for "a passable road, a grade such as is ordinarily laid in a country road" (Printed Record, p. 34). The county engineer refused to approve such profile, stating that he desired that the matter be taken up with the city authorities after the annexation (Record, p. 35). Nothing further was done at that time, but in August, 1907, the Indian addition was regularly and duly annexed to the city of Tacoma and became a part thereof. After this had been done the company's engineer submitted the profile to the city's engineer. The city engineer refused to approve the same, and changed

it by requiring deeper cuts and higher grades to be made, changing the fill in front of plaintiff's property from a fill of from 1 to 4½ feet high to a fill of from 10 to 12 feet high (Printed Record, pp. 33, 48). The city charter of Tacoma, of which the courts take judicial notice, contained numerous provisions requiring grades to be established by ordinance only (Charter of City of Tacoma, sec. 52, subsection 7, also section 185, prohibiting the vacation of streets except by petition of the property owners) or except for public purposes (Charter, sections 204, 205). Other sections gave the property owners a right to be heard by the city council before the establishment of any grade or the doing of any grading (Charter, section 135). No attention was paid to any of these requirements; no formal action of any kind was taken by the council. On the contrary, the railway company, without any attempt to comply with the charter, went upon the street and made the grade and fill as called for by the plans of the city engineer, constructing in front of plaintiffs' property a wall twelve feet high, to the damage of these plaintiffs in the sum of from $5,000.00 to $6,000.00 (Printed Record, p. 58). This damage accrued partly, at least, from the fact that the grade was raised so much higher than the original figures submitted by the company's engineer to the city engineer (Printed Record, p. 58). The rental value of the property was entirely destroyed (Printed Record, p. 61).

While this work was in progress the Mayor and Mr. McGregor, commissioner of public works, together with Mr. Rankin, Mr. Turnbull, Mr. Giblett, and Mr. Wilkeson, being members of the city council, and the committee on streets and alleys, at various times visited the work and approved the same (Printed Record, pp. 38-39). Mr. Ettor was never consulted in the matter (Printed Record, p. 42).

In the meantime the Supreme Court of the State of Washington had construed the State constitution relating to the damaging of property for public use, and the statute

above set forth, as applied to the damage of abutting property by the establishment and construction of an original street grade.

Fletcher *vs.* City of Seattle, 43 Wash., 627, decided Septemper 29, 1905: A fuller discussion of this case will be found in the argument, but briefly stated, the doctrine laid down was as follows:

First. That the *constitutional provision* prohibiting the damaging of property for a public use, without first making compensation, does *not* apply to the damages accruing to abutting property by the establishment and construction of an original grade.

Second. That the *statute* above set forth *does* require a city establishing an original street grade which damages abutting property, to provide compensation therefor, as set forth in section 48 of the act of 1907, and that a failure so to do justifies an action against the city to recover the damages suffered.

With the law and facts in this condition, plaintiff in error commenced his action in the Superior Court against both the city and the railway company to recover his damages suffered. The action came regularly on for trial on the 11th and 12th days of March, 1909. While the action was so pending and before its final determination the Legislature of the State of Washington passed the act of 1909 (Laws, 1909, ch. 80), effective immediately on passage, by which section 48 of chapter 153 of the Laws of 1907 was amended in the proviso thereof, by the insertion of the word *"not"* instead of "only," so as to read:

"Provided, however, that *this section* shall *not* apply to the original grading of such street." No other provision of the act was amended. The act as amended provided that the city might "damage land for any * * * public use within the authority of the city, after just compensation having been made," etc.; that when the city desired to damage property for any purpose authorized by the act, it should

proceed in a certain manner; that when the city desired to damage property by the establishment of a grade, it might pay the compensation in another manner. *"Provided, however,"* that this last procedure shall *not apply* to the *original* grading of such street.

Defendant in error immediately called the attention of the trial court to this change in the law, and the court held that the effect of the amendment was to deprive plaintiff of any right to recover for the damage suffered by the grading so completed without any pretense of first making or providing for the compensation required by the law in force when the grading was done and the damage suffered. Accordingly a judgment of dismissal was entered, from which plaintiff appealed to the Supreme Court of the State. On the original trial and on the appeal plaintiff in error contended that to give the amendment of 1909 such an effect as to defeat plaintiff's right of recovery for the damage resulting from the construction of the grade, without making the compensation required by the law in effect at the time of the plat, at the time of the annexation to the city, and at the time the work was actually done and the damages suffered, was in direct violation of the Fourteenth Amendment to the Constitution of the United States, forbidding any State to deprive a citizen of property without due process of law, and also of Article I, section 10 of the Constitution of the United States, forbidding any State to pass a law violating the obligation of a contract. The State Supreme Court held that the effect of the amendment of 1909 was to do away with any right of recovery for the establishment of an original grade, growing out of the act of 1907, and previous years, in force when the grading was done, and the damage accrued, and that such effect was not contrary to either clause of the Federal Constitution invoked by plaintiff in error. On the entry of the judgment of affirmance, based on these decisions, this writ was sued out to the Supreme Court of the United States.

Assignments of Error.

Plaintiffs in error set out the following assignments of error. The Supreme Court of the State of Washington erred:

1. In holding that the effect of Laws of Washington, 1909, C. 80, as interpreted by said Supreme Court, so as to prevent a recovery for the damages inflicted on plaintiffs in error by defendant in error in the establishment and construction of the grade before the passage of such act, and while the laws of 1907, C. 153, were in full force and effect, was not to deprive plaintiffs in error of their property without due process of law, as forbidden by the Fourteenth Amendment to the Constitution of the United States.

2. In holding that no contractual obligation to recompense plaintiffs in error, within the protection of Article I, section 10 of the Federal Constitution, arose from the establishment and construction by defendant in error of the original grade abutting on the property of plaintiffs in error, to their damage, while Laws 1907, C. 153, sections 1-48, inclusive, were in force, requiring the making or providing for compensation for such damages before the city should cause them; and that therefore no such obligation was violated by the retroactive effect given Laws 1909, C. 80.

3. In holding that no contractual obligation, within the meaning of Article I, section 10 of the Federal Constitution, arose to recompense plaintiffs in error for damages arising by the construction of an original grade abutting on their premises, from the platting of said property and street, and the annexation thereof to the City of Tacoma, and the purchase of said property by plaintiffs in error, all while Laws 1907, C. 153, sections 1-48, inclusive, and prior identical laws, requiring such recompense for such damage,

were in force; and that, therefore, no such obligation was violated by the retroactive effect given Laws 1909, C. 80.

4. In affirming the judgment of the Superior Court nonsuiting and dismissing the action as to the defendant, the City of Tacoma.

5. In affirming the judgment of the Superior Court nonsuiting and dismissing the action as to the defendant, the Chicago, Milwaukee & St. Paul Railway Company.

ARGUMENT.

The above statement fairly presents four questions for determination by this court:

1. Did the right to compensation for the damages suffered by plaintiffs in error, accruing to them by virtue of the statute in force when the property was platted, when it became a part of the city, when it was bought and when the damage was done, constitute "property" within the meaning of the Fourteenth Amendment to the Federal Constitution.

2. If so, did the amendment of 1909, as interpreted by the State Supreme Court, deprive them of that property without due process of law?

3. Did the plaintiffs in error have any contractual right to compensation for damages resulting from the original grade, growing out of either

a. The platting of the street and subsequent annexation of the addition while the original statute requiring compensation for an original grade was in force.

b. The purchase of the property by plaintiff in error while the original statute, requiring compensation for an original grade, was in force, or

c. The completion of the original grade to plaintiffs' damage, under a statute authorizing such grading only on the making or providing for compensation.

In determining these questions, we assume that this court will be governed by the rules heretofore adopted in such cases.

1. Whenever rights growing out of a State statute are alleged to be within the protection of the Federal Constitution, and to have been defeated by subsequent State action, the Supreme Court of the United States will determine for itself and independently of the ruling of the State court, as to the nature of such rights conferred by the original statute, and as to whether or not such rights are in fact within the Federal Constitution.

Jefferson Branch Bank *vs.* Skelly, 66 U. S., 431; 17 Law Ed., 173.

Bridge Proprietors *vs.* Hoboken Land & Imp. Co., 68 U. S., 116; 17 Law Ed., 571.

Chicago, B. & Q. R. Co. *vs.* State of Nebraska *ex rel.* Omaha, 170 U. S., 57; 42 Law Ed., 948.

Douglas *vs.* Commonwealth of Kentucky, 168 U. S., 488; 42 Law Ed., 948.

In the particular case at bar, as more fully appears in the argument, the construction of the original statute which this court would be bound to make from the statute itself, is also the one which the Washington Supreme Court had adopted at the time the injury complained of arose. This being true, the proper construction of the original statute will admit of no doubt.

2. The Supreme Court of the United States will accept the holding of the State court as to what the legislature intended by the amendatory act of 1909. If the legislative intent so determined involved a deprivation of property without due process of law, or the violation of a contract,

then the amendment is void, though this court might not originally have adopted such interpretation of the amendment.

Smiley *vs.* Kansas, 196 U. S., 447; 49 Law Ed., 547.
Gatewood *vs.* North Carolina, 203 U. S., 531; 51 Law Ed., 305.
Armour Packing Co. *vs.* Lacy, 200 U. S., 226; 50 Law Ed., 451.
Missouri, K. & T. R. Co. *vs.* McCann & Smizer, 174 U. S., 580; 43 Law Ed., 1093.

Passing then to a consideration under these principles of the Federal questions involved.

I. THE RIGHT TO COMPENSATION FOR THE DAMAGES SUFFERED BY PLAINTIFFS IN ERROR, ACCRUING TO THEM BY VIRTUE OF THE LAW OF 1907, AND PRIOR IDENTICAL STATUTES, WAS "PROPERTY" WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It is a very well settled rule of law that a city can act only in accordance with legislative authorization, and that if it is authorized to do a thing in a certain manner, or on certain conditions only, and does it otherwise, and damage results from such action, it is liable for such damage. Particularly would this be true where authority to damage is coupled with an express requirement for compensation for such damage by a certain method. No further statute authorizing an action to recover for damages inflicted without complying with such a requirement is needed. The right of action in such a case flows, by force of the common law, from the failure of the city to comply with the statutory requirement. The case before the court is such a case. Section 1 of the act reads:

> "Every city of the first class *is hereby authorized and empowered* to condemn land and property for streets * * * and for the opening of any street * * * and *to damage* any land or other property for such purpose, * * * and *to damage* the same *for any other public use* within the authority of such city after just compensation having been first made or paid into court for the owner *in the manner prescribed by this act.*"

Section two provides "that when the corporate authorities shall desire to * * * *damage the same* (property) *for any purpose authorized by this act,* such city *shall*" proceed by ordinance making provision for compensation.

Now, it is perfectly plain that under this statute the city is authorized to "damage" property, as the term is used in the statute and sections, *only* on making compensation therefor. So far as the force and effect of the statute are concerned, it is immaterial whether the "damages" covered by the statute are the same "damages" referred to in the constitutional inhibition against damaging property without first making compensation therefor. If the statute stood absolutely alone, still it would prohibit a city from "damaging" property, as the term is there used, without making the compensation therein provided. If it damages property *without* making the compensation required by the statute, it is doing an unlawful act, because acting in a manner contrary to the statute, and must answer therefor as any other wrongdoer. The statute is *not* one specifically giving a *right of action*—it *is* one prescribing the only way and circumstances in which a city may lawfully damage property, and it is by force of the common law that the right of action flows from an *unlawful* damage by a city inflicted without complying with such requirement.

The effect of the law is to declare unlawful any "damage" of property by a city, unless the procedure therein outlined is followed, and the unlawful quality of the act is in no way mitigated though the "damage" therein referred to may

not be further protected by the constitutional inhibition as to prior compensation for damages by the public authorities.

But if these sections stood alone it might be argued that the term "damage" as there used was meant to be synonymous with the same term as used in the constitutional inhibition, and that therefore the act would *not* render unlawful a "damage" of abutting property by an original grade. Section 48 of the act, however, disposes of this argument. For by the terms of section 2 the act applies to "*any* damage *for any purpose authorized by this act.*" And section 48 very plainly authorizes damages for the purpose of an original grade. Indeed, it would seem that the legislature had in mind the doctrine that the State constitution as to damaging for a public use does not apply to damages arising from an original grade, and intended to make it perfectly plain that the *statute did* include such damages. For as to all other damages, the statute, in accordance with the constitution, requires the compensation to be first made, while as to damage by an original grade only, the city is authorized to make the compensation either before or after. The gist of the whole act is and can be nothing else than this:

The city may damage property "for any public purpose" and "for any purpose authorized by this act" on condition only of complying with the requirements of this act. The city may damage property by an original grade only on two conditions: either on complying with the requirements as in other cases of damage, or by making compensation afterwards in a particular manner. If section 48 were an enactment standing by itself, it would still have this meaning; for authority to a city to do an act on certain conditions is equivalent to denying it authority to do it otherwise. But when it is considered in connection with section 2, which expressly demands that whenever the city shall desire to damage property for "any purpose authorized by the act,"

it shall do so by ordinance making provision for compensation, there is no room for construction left.

Whenever, therefore, the city damaged property by an original grade without complying with the act and either making compensation before the grading or making provision for its payment thereafter, it did an unlawful act for which it was answerable, not because the statute gave a right of action, but because the statute made the act unlawful. This is the only reasonable interpretation of the act, and it is the interpretation which the Washington Supreme Court had announced at the time the injuries complained of occurred. And while we understand it to be the duty of the Supreme Court of the United States to determine such question for itself, still added cogency is given to the argument when it is the interpretation given it by the Supreme Court of Washington.

The case of Fletcher *vs.* Seattle, 43 Wash., 627, decided in 1906, was first heard without reference to the statute now under consideration, and the court held that the State constitutional inhibition against damaging property for a public use without first making compensation did not apply to damages (as distinguished from actual entry or taking) by the establishment of an original grade. This on the theory that such damages were considered and compensated for or relinquished by the property owner at the time of the original plat.

The case coming on for rehearing, the attention of the court was called to the statute now under consideration, and the court said:

> "It is contended by the learned counsel for the city that the right is not conferred by this section, that the statute should be strictly construed, and that it does not contemplate a cause of action for consequential damages; that it merely provides that where a street is graded in such a manner as to damage abutting property, the city may provide that the compensation to be made for such damages should

be assessed to the cost of the grading, and assessed against the abutting property in the manner provided by the charter provisions in force in said city for the assessment and collection of cost of such improvement on the property benefited thereby, and that *if a cause of action had been given for such class of damages* the grant would have been express and explicit; that the object of the statute is to enable the city to include damages for actual trespass upon private property in the construction of the improvement and that the damage referred to should be construed to be such damages as the property owner has the right of action for under other statutes or constitutional provisions, or by force of the common law. It does not seem to us that this position is tenable. We think the word "damages" used in the section has the same significance and meaning that it has in *other sections of the same act, and that it was used in its broad sense and includes consequential damages.* We see no reason why this provision of the law should be segregated from the other provisions, and a different construction placed upon it, *or why the provisions of the act in relation to the assessment of the damages should not apply to it as it does to the other sections, and if it does, the right of compensation is equally granted.*"

In other words, the Washington Supreme Court holds that the provisions of sections 1 and 2 of the act, *expressly* requiring a city to make compensation, as a necessary condition to the rightful damaging of the property, apply to the consequential damage of abutting property by an original grade referred to in section 48, and that this being true, it was not necessary that there be given any explicit right to recover by action, where such steps were not taken. The right of action flowed from the violation of this statute.

Further on the court used the following language:

> "Section 2 says, when the corporation authorities of any such city shall desire to condemn land or other property or damage the same for any purpose authorized by this act, such city *shall provide,* etc. In

> this case the city had the power to damage the respondents' land, and it was found that it did damage it and *it damaged it in a way that it was authorized by sec.* 47 *of this act;* namely, by establishing a grade on the street upon which their property abutted."

And the city having so damaged the property "as authorized by the act," but without following the conditions imposed by the act was, of course, held liable for the injury in the action brought to recover for such illegal act.

A right of action for damages resulting from the construction of an original grade by a city which has not made or provided for compensation in the manner required by the act, being then a right of action for an act made unlawful by the statute, we proceed to determine whether such a right is "property" within the meaning of the Fourteenth Amendment to the Federal Constitution.

And, in the first place, it may be laid down as a general rule that a vested right of action is property, and as much protected by the Fourteenth Amendment as land or money.

Numerous authorities to this general unquestioned statement might be cited, but we content ourselves with two which no one will question.

> Cooley Const. Lim. (4th Ed.), p. 449.
>
> Angle *vs.* Chicago, St. P., M. & O. R. Co., 151 U. S., 65; 38 Law Ed., 55.

The Angle case was one in which there was properly before this court the validity of what was alleged to be an attempt by the legislature to do away with the right of action arising out of a tort committed prior to the passage of the act. The court used the following language:

> "But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the act of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought.

> Can it be that the legislature, by passing these acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage Company? Did the resumption of the land grant and the regrant to the Omaha Company make lawful its acts in bribing the officers of the Portage Company? Did it relieve the Omaha Company from any liability for the wrongful use of the process of the courts in the injunction? Could it act judicially and in effect decree that the wrongs done by the one company to the other created no cause of action *A right of action to recover damages for an injury is property,* and has a legislature the power to destroy such property? An executive may pardon, and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from liability to the individual he has wronged."

We are aware that there are numerous decisions of this court, prior to the adoption of the Fourteenth Amendment, holding that there is nothing in the Federal Constitution to prevent a State from passing a retroactive law, as to other than a criminal or contractual matter, and not, therefore, either *ex post facto* or within the inhibition against the violation of contracts. But these decisions, so far as we know, were before the adoption of the Fourteenth Amendment, and are not in conflict with the Angle case, *supra,* decided since the passage of such amendment, and which expressly holds that a cause of action for tort *is* property which a legislature cannot destroy.

Unless, therefore, there is something peculiar in a cause of action *arising out of a violation of a statute,* taking it out of this general rule, the cause of action presented by this case was property, and as such, protected from legislative interference. It was at this point that the State Supreme Court, in our opinion, fell into its first error. It held that the effect of the amendment of 1909 was to repeal section 48 of the act of 1907 and prior years, that if the rights

given by the act of 1907 were substantive, we were right in our contention, but that we were, in truth, merely asking for the enforcement of a cause of action, given only by statute, and that such cause of action fell with the repeal of the statute. We quote the argument of the court:

> *"The right in this case is statutory, and a pending action, at whatever stage, falls with the statute.* There is a marked difference between the creation of a new or cumulative remedy for an existing right and the creation of the right itself. That the repeal of a statute conferring jurisdiction *or creating a right of action,* without a saving clause, takes away all right to proceed, and that the repealed act will be considered as if it never existed, except for the purposes of those actions or suits which have been prosecuted and concluded while it was an existing law, has been so often stated in the books that it has become axiomatic. It is even held that a repeal after judgment, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to a higher court charged the appellate court with the duty of declaring the litigation ended without right of further prosecution." * * *
>
> "As will be seen by reference to these authorities, the rule is applied by the courts *in all cases* where the right depends on the remedy, for the rule is universal that there is no vested right in a particular remedy *unless the remedy is a part of the right itself."*

The vice of this argument and holding is two-fold:

First. Neither reason nor authority will support the argument in the broad form stated.

Second. As we have already shown, this is not a mere cause of action given by a statute, but a right of action arising from a violation of the statute, from the doing of an unlawful act.

In discussing the question as to how far a right of action given by a statute can be affected by a subsequent repeal of the statute, it may be admitted that there is authority for

the holding that *penalties unrecovered* when the statute giving them is repealed, fall with the statute. But these cases are based on the theory that a penalty is a peculiar form of obligation or punishment imposed by the sovereign, and whether by virtue of the particular statute imposing the penalty, or by reason of the very fact that it *is* in the nature of a punishment, may be remitted by the sovereign which imposed it. Therefore, any right to the penalty prior to its actual collection from the wrongdoer, must be necessarily inchoate, and subject to this power of remission. Furthermore, in the only case in which this court has upheld such doctrine, the court has deemed it necessary to first determine that the particular statute imposing the penalty itself contained authority for its remission by the Government.

U. S. *vs.* Morris, 10 Wheat., 246.
Confiscation Cases, 7 Wall., 454.

But even if this rule is well founded, it has no application here, for whatever else the law of 1907 may have been, it certainly was not a statute imposing a penalty.

So also there are cases of curative states, held to violate no vested right though they operate retrospectively. But these are cases of mere irregularity, which might be cured by the State, and where the right claimed to be vested was inequitable in its nature, and became vested as stated by Chancellor Kent, "subject to the equity existing against them and which the statutes recognized and enforced."

Kent's Commentaries (12th Ed.), vol. 1, p. 517, page 456.

And as further observed by the same eminent authority at the same place, such cases "cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principles." And surely no one can seriously contend that the act of

1909 is a curative or ratification statute, or that if it were, the rights already accrued and which it is claimed to divest, contain any element of inequity. On the contrary, they are most just and equitable.

But the largest class of cases, and those concerning which there has been the most dispute, are those in which it has been held that the repeal or amendment of a statute giving a new or cumulative remedy, defeats all actions pending at the time of the repeal. As already stated, prior to adoption of the Fourteenth Amendment, this court had no concern with such State statutes, except as they might involve the obligation of a contract. And in the discussion of this question, expressions have been used both by courts and text writers, which, when taken aside from their connection, would seem to indicate that under all circumstances the repeal of a statute necessitates the determination of pending cases as though the statute had never been passed. But no such sweeping statement will stand the test either of reason or authority. Stated briefly, the doctrine of this court on such matters is as follows:

Though the form of a statute may be remedial, yet if the rights therein given are in truth substantive, the subsequent repeal or amendment of the statute will not effect rights existing under the statute.

Barnitz *vs.* Beverly, 163 U. S., 118; 41 Law Ed., 93, citing and affirming numerous former decisions.

And this same rule applies where the statute repealed declares that one shall have a right of recovery. The substantive right involved persists after the repeal.

Steamship Co. *vs.* Joliffe, 2 Wall., 450.

It is true that these are cases in which the substantive rights in question were those involved in the obligation of a contract. But if the constitutional inhibition against the violation of a contract will prevent the rule that the effect of a statute dies with its repeal from operating to divest con-

tractual rights incurred thereunder, we see no reason why the constitutional inhibition against the deprivation of property, will not also prevent such rule from operating to divest property rights accrued under the statute. Underlying the holding of the State court is the assumption that rights accruing under a statute giving a new cause of action, cannot be "property," for the reason that the rights so accrued are subject to be divested at will by the repeal or amendment of the statute. If this assumption were correct, it would follow that neither could the provisions of a statute giving a new right of recovery constitute "contractual obligations," for the same reason that all implied statutory promises were conditional and subject to be abrogated by the repeal of the statute. But this court, by holding that a purely statutory right of recovery may constitute a contractual obligation (Steamship Co. *vs.* Joliffe, *supra*), not subject to be defeated by the subsequent amendment or repeal of the statute, has in so doing held that a right of recovery given by a statute is not given subject to be divested at legislative will. If it were it could never constitute a contractual obligation any more than any other promise given expressly subject to be recalled at will would constitute a contract. To say that its repeal cannot be given a retroactive effect *because* it is contractual is to dodge the question. Before the Federal Constitution can operate there must be a "contract," and before there can be a contract there must be a promise which does not contain within itself a power of revocation. In other words, the broadly stated general rule that purely statutory rights are subject to the further legislative will does not apply to substantive rights. If it did, a promise inhering in a statute or State charter would necessarily be given subject to such right of repeal, and could never constitute a valid "contractual obligation," and a State could never make a statutory "contract" for the Federal Constitution to protect.

So far as we know this court has never directly passed

upon the question as to whether a right of recovery not penal in its nature and given by a statute constitutes "property" within the meaning of the Fourteenth Amendment. But in the Joliffe case, *supra*, such a right is held to be a "vested right," which, of course, is property. While the case is not as clear on this particular point as we could wish, special attention being given to its contractual features (a branch of this case which we take up later), yet no reason is perceived why a contractual right of recovery should be any more "vested" than any other right, needing only the pronouncing of judgment to make it effective.

In Louisiana *vs.* Mayor of New Orleans, 109 U. S., 291, it appeared that a statute gave a right to a citizen for reimbursement for damages suffered by a mob. A citizen recovered judgment under this statute, but was prevented, at least temporarily, from collecting it by a subsequent statute limiting the right of the city to raise money by taxation. The court held that the judgment was not a contract, and that "conceding that the judgment, though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that they are capable of ownership and may have a pecuniary value, the relators cannot be said to be deprived of them so long as they continue an existing liability against the city." The limitation on the taxing power did not constitute a "deprivation" of such property. He still had his judgment, which he might collect in some other way.

While this is not perhaps a *direct* holding on the point, yet if the court had not believed that the right of recovery given by the statute was "property," it would almost certainly have so held and avoided the close reasoning necessary to justify its holding that the limitation of taxing power was not a "deprivation" thereof.

Mr. Justice Bradley, in a concurring opinion, held that the question of the recompensing of a citizen in such a case was purely a matter of legislative policy and that the right might

be taken away even after the injury occurred. Mr. Justice Harlan expressed the contrary view as follows:

> "But if this view be erroneous, it seems quite clear that the State constitution of 1879 cannot be applied to these judgments without bringing it into conflict with that provision of the Constitution, which declares that no State shall deprive any person of property without due process of law. That these judgments are property within the meaning of the Constitution, cannot, it seems to me, be doubted. They are none the less property because the original cause of action did not arise out of contract, in the literal meaning of that word, but rests upon a statute making municipal corporations liable for property destroyed by a mob. If a judgment giving damages for such a tort is not a contract within the meaning of the Constitution, it is, nevertheless, property, of which the owner may not be deprived without due process of law."

The case now before the court is in every way stronger than the case then being considered. The case there was for damages wrought against the will of the city and by enemies of the city; here it is for damages wrought by the city itself and its agents. It is true, the claim now before the court was not reduced to judgment when the law was changed, but in so far as its being property was concerned, such fact is immaterial. It had a "pecuniary value" and was "capable of ownership," just as the judgment in the Louisiana case. Furthermore, being based upon an injury to property, it was both assignable and would survive the death of plaintiffs in error.

Jordan *vs.* Welch, 61 Wash., 569.

Long prior to the passage of the Fourteenth Amendment, Chancellor Kent used the following pertinent language with reference to retroactive law:

> "It cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was ac-

> tually passed. A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of Dash *vs.* Van Kleeck, and shown to be founded not only in English law, but on the principles of general jurisprudence. A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void."

Kent's Commentaries (4th Ed.), pp. 455, 514, 515. He based such declaration upon the general principles underlying all constitutional government. This court has held that it cannot declare a State statute unconstitutional because of such general principles unsupported by a specific constitutional inhibition. But in the Fourteenth Amendment there exists such a specific provision which we respectfully ask to have enforced.

The case of Dash *vs.* Van Kleeck, 7 Johns., 477; 5 Am. Dec., 291, is directly in point on this phase of the discussion.

The New York legislature had passed a law which, as interpreted by the court, gave a creditor the right to recover from a sheriff who had let a debtor prisoner escape, even though there was a recapture prior to the commencement of the action against the sheriff. This was an entirely new right of action given the creditor, in addition to those given at common law. There was not even an imposition of new duties on the sheriff, with a right of action for their breach. It was solely and purely a statutory right of action. An action having been started under this statute, the legislature passed a new law, directing that nothing in the original statute should be so construed as to prevent the officer from availing himself, "as at common law," of a defence arising

from a recapture of the prisoner. The question presented to the court was as to the effect of the new law on the action already commenced under the original statute. The decision of the majority of the court was to the effect that the new law should not be given a retroactive effect. And the reason for this holding was very plainly stated to be that the rights under the original statute had vested, when the escape occurred, with the statute in force, and therefore could not and should not be disturbed.

Thompson, J., used the following language:

> "It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take by law the property of one individual without his consent and give it to another. The principle contended for on the part of the defendant inevitably leads to and sanctions such a doctrine. For if the plaintiff can be deprived of his remedy already vested, with equal propriety might he be compelled to refund the money had he actually received it."

Further along he said:

> "Giving to the act now under consideration a retrospective operation would manifestly be productive of these consequences, *for it not only takes away a vested right, but punishes and endamages the plaintiff in the payment of costs.* If his action is defeated, and his right of recovery taken away by this statute, he not only loses his own costs, but will be obliged to pay costs to the defendant."

Chancellor Kent, then Chief Justice, exhaustively reviewed both the civil and the common law as to retrospective statutes and shows them to be universally condemned. The Chief Justice said:

> "The very essence of a new law is a rule for future cases. The construction here contended for on the part of the defendant would make the statute operate unjustly. It would make it defeat a suit already commenced *upon a right already vested.* This would

be punishing an innocent party with costs, as well as divesting him of a right previously acquired under the existing law. Nothing could be more alarming than such a subversion of principle."

The point we wish to emphasize is that both these eminent jurists unqualifiedly held that this purely *statutory right of action* constituted a *vested right*. At that time there was no constitutional prohibition as to the violation of such rights, and to avoid such an effect they were forced to interpret *the law* so as not to give it a retroactive effect. But the right to recover, though it was purely a right of recovery based on a statute which did not even create any new duty, was held to be a vested right, a right which is now unquestionably protected by the Fourteenth Amendment.

For a second reason, however, the argument of the State court is unsound. It assumes throughout that this action is one based on a statute which merely gives a right of action. We have already at some length endeavored to show that this is not true, but that our cause of action arises from the establishment and completion of a grade by the city without complying with the conditions of recompense imposed by the statute and necessary to render the action legal. Plaintiffs in error are in a better position than the judgment creditor in Louisiana *vs.* Mayor, *supra*, or the plaintiff in Dash *vs.* Van Kleeck. They were suing under statutes which merely said: "You shall have a right of recovery" in certain circumstances. We are suing under a statute which says to defendants, "If you damage plaintiffs' property by this grade, without making compensation, you are committing an illegal act and, of course, shall be answerable therefor."

The case of Graham *vs.* C. M. & St. P. Ry. Co. (Wis.), 10 N. W., 609, is very instructive as to the distinction between a statute which merely gives a right of action for a penalty and a statute which prescribes certain duties and allows a recovery for a violation thereof. It appeared that

there was in existence in Wisconsin a certain statute fixing the rate which the railroad company might charge, and providing that in case the company charged more the shipper might recover three times the excess of the charges. While this law was in effect the railroad company violated it by charging plaintiff more than the sums permitted. Subsequently, and before action was brought, the whole statute was repealed. Plaintiffs brought action, suing for three times the excess as permitted under the statute. The lower court refused to permit such complaint to stand, whereupon they amended, asking only for the excess, and on trial judgment was rendered for the plaintiff for such excess, together with interest. The defendant strenuously insisted that the repeal of the statute did away entirely with any right of action to recover for the excess charges. The court, while admitting that the repeal of the statute did away with the right to recover the penalty, held further that such principle did not do away with the right to recover for damages suffered by reason of a breach of a statutory duty. The charging of excess rates was a violation of the statute for which the plaintiff might recover, even after the repeal of the statute fixing the rate.

> "As we have shown above that an act which is void by reason of the laws existing at the time it is done is not made valid by a repeal of the law, the relations of the parties and their rights arising out of such unlawful acts must remain the same after the repeal as they were before, except only as to such inchoate rights of action as are expressly given by the statute. All other rights which result from the mere existence of the statute, and do not depend for their enforcement upon its provisions, are not affected by its repeal. To illustrate, the right to recover back money unlawfully demanded and received by the railway company for charges in excess of the legal and fixed rates after the repeal of the statute, does not depend so much upon the fact that the relation of debtor and creditor had become fixed between the

parties during the existence of the law, as upon the other fact that the company acquired possession of the plaintiff's money by an act which was unlawful. The *repeal of the law does not purge the act of its unlawful character, and so the relations of the parties remain the same after as before the repeal*—the company still retains possession of the plaintiff's money unlawfully."

"Suppose a railroad company should, in violation of the existing law, run at an unlawful speed through a city, or fail to ring the bell at a public crossing, and by reason of such unlawful running or neglect to ring the bell a citizen should be run over and seriously injured, would the repeal of these statutory provisions affect the injured party's right to recover for his injuries? We think under the decisions of this court, which hold that an act which is unlawful by statute when done cannot be made lawful by a subsequent repeal of such act, such repeal could not affect the party's right of action. *Notwithstanding the repeal, the fact would remain that the act which caused the injury was unlawful, and therefore a sufficient ground for the maintenance of the action.*"

The same rule is approved in Endlich on Interpretation of Statutes, section 481, where it is said:

"Rights that have become vested under a statute cannot ordinarily be divested by a repeal of it—*so it has been held that the repeal of a statute takes away no right of action for damages which has already accrued.* * * * Thus where an act which made it unlawful for a railway company to charge higher freight rates than those prescribed in the act was repealed it was held that a party who, during the time when the act was in force, was compelled to pay higher rates and did so under protest, was not deprived by the repeal of a right of recovery therefor."

The Supreme Court of Washington itself decided a somewhat similar case in Miller *vs.* Union Mill Co., 45 Wash.,

199. In that case the factory act of 1903, which prevented the application of the doctrine of assumption of risk where the employer failed to guard his machinery as the statute required, was repealed after an accident to a mill employee, but before the trial. Defendants insisted that the repealed act, so far as it related to the case, merely gave a right of action and that, therefore, its repeal before the trial took away such right of action and left the case as though the act had never been passed. The Washington court, however, clearly distinguished between such a case and the case then before it, pointing out that the past relation and rights of the parties, as fixed by the law, was a substantive right, which could not, therefore, be modified by the subsequent repeal of the law. In the court's opinion (p. 208) it was not possible that two employees should be injured in like manner on the same day, and one recover because he succeeded in getting his case tried before the repeal of the law, while the other failed because, through no fault of his own, his case could not be heard before the repeal became effective.

We do not know how to make our position on this branch of the case any clearer. Under the best of authorities and reason even a right of action which exists solely because a statute declares it shall come into being on certain contingencies becomes, on the happening of such contingency, a vested right and "property" which cannot be taken away without due process of law. But when, as in the case at bar, the right of *action* exists, not merely because the statute declares it shall exist, but because the defendants have violated a statute to our damage, then such right of action is "property" and protected by the Fourteenth Amendment.

II. THE RIGHT OF ACTION BEING "PROPERTY," THE AMENDMENT OF 1909, AS GIVEN EFFECT BY THE WASHINGTON SUPREME COURT, DEPRIVES PLAINTIFFS IN ERROR THEREOF WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT.

We do not see any necessity for arguing this statement. It is settled law that action by the legislature is action by the State, and that an attempted wiping out of property rights by such statute is a "deprivation without due process of law."

III. PLAINTIFFS IN ERROR HAD A CONTRACTUAL RIGHT TO COMPENSATION FOR DAMAGES RESULTING FROM AN ORIGINAL GRADE, BASED UPON THE PLATTING OF THE STREET AND ADDITION, ITS ANNEXATION TO THE CITY OF TACOMA, AND PURCHASE OF THE PROPERTY, ALL WHILE THE ORIGINAL STATUTE REQUIRING SUCH COMPENSATION WAS IN FORCE.

As already noted, the Indian Addition, in which this property was situated, was originally platted "as an addition to the city of Tacoma." And this being the case, and the addition having been thereafter annexed by the city, and the same statute having prevailed at the time of the platting and the annexation, we think it not necessary to present any argument to show that the contractual rights of the subsequent purchaser of the property, with the same law still in force, are the same as though the property had been within the city when originally platted. The matter is self-evident. We shall, therefore, discuss the case without further particular reference to the fact that the annexation was subsequent to the plat.

It is not necessary in this case to inquire particularly what would be the contractual rights of one who, while the original statute was in force, purchased property platted before its enactment. For the record shows that the platting, annexation and purchase all took place under the same statute. But as these different circumstances each adds force to the

contractual obligations of the parties it may be well to consider them separately.

And in this connection it is important to consider the basis on which it has been held by the Washington court that, in the absence of statute, no right of compensation to an abutting property owner arises from the establishment and construction of an original grade. The reasoning is very fully set forth in Fletcher *vs.* Seattle, 43 Wash., 627, quoting from Dillon on Municipal Corporations, vol. 2 (4th ed.), 995:

> "When, under such legislation, an owner dedicates without restriction, land for a public street, *he must be taken to consent,* for the reasons stated in a previous section, that the public authorities may determine grades and possibly what future changes in grades may be necessary or desirable for the public convenience. He must contemplate that hills within the limits of the street will be reduced from the natural surface, making a cut; that ravines and low places therein will be filled up to the ordained grade or level, leaving an embankment in front of the abutting property. The right to make such improvement of the street for street purposes *would seem to be embraced in his grant or dedication to the public.* If lands for a street are unconditionally acquired, by eminent domain, the right thus to graduate and improve the street for street uses proper is *included in the compensation awarded.* In view of these considerations, it seems to us clear that for the original establishment of a grade line and the reduction of the natural surface of the street for street purposes to such line, there is no legal right or even natural equity in the dedicator or his assignee to compensation. * * * *For the reasons above suggested,* it seems to us that, on principle, the mere provision of the Constitution imposing a liability for property damaged for public use does not create a liability on the part of the municipality for reducing the natural surface of the street, in the course of its normal and ordinary improvement for street purposes proper, to a grade line for the first time established."

Briefly stated, the property owner *contracts* that without further liability the sovereign authority may establish on the streets platted any reasonable original grade.

The plat being then in the nature of a contract, what were its terms, in view of the statute in force when the plat was made by the United States, whose successors in interest are the plaintiffs in error. As already noted, it is settled law that the statutory law affecting the substantive rights accruing under the contract, become a part of the contract. And certainly no one can doubt that the statute in question here did very materially affect the substantive rights of the parties to the contract of platting. As modified by the statute, the contract of platting would be an agreement by the property owner that the sovereign authority may establish on the streets platted, any reasonable original grade, *Provided, however,* that compensation shall be made at the time of the establishment of such grade for any damage accruing to the abutting property. The force of this argument is possibly even plainer where the contract was one forced upon the property owner by eminent domain. In such case, in the absence of statute, he would have no right to the compensation for a subsequent original grade, for the reason that in the eminent domain proceedings his compensation for such grade would have been already paid—it would have been "included in the compensation awarded." But if at the time of the eminent domain proceedings there were on the books a statute providing that compensation should be made when the grade was constructed, it is perfectly plain that no court would allow him other compensation in the award given. With such a statute on the books the sovereign body would not have to pay for the right to establish an original grade without compensation, for it would not get such a right. The exact question presented seems to be new so that no authority on all fours may be found, but the principles involved are elementary and do not seem to require discussion or citation of authority.

The State said: "If you dedicate a street and we subsequently damage the same by an original grade while it is within a city of the first class, we will pay you, or your successors in interest, in a certain manner." Plaintiffs' predecessors in title did dedicate a street under such promise. It was damaged by an original grade while a part of a city of the first class, and now we insist that the Federal Constitution will prevent the State from repudiating its contract.

It may be noted in passing that in the court below, defendants in error, in ignorance as to the showing of the record, that the street was both platted and became a part of the city of Tacoma while such statute was in force, insisted that the contract brought into effect by the platting prevented the State from subsequently requiring the *city* to make compensation for the original grade. But, of course, no such result could follow, even had the facts been as they supposed, for the State would have the right at any time to place additional limitations, favoring and not burdening the property owner, upon the exercise by the city of the governmental powers delegated to it.

But in addition to the platting and annexation of the street while this statute was in force, there is the additional fact that these plaintiffs in error purchased the property while the statute was still the law, and were its owners when the annexation took place. And, taking this additional fact into account, we have a recent decision of this court exactly in point. We refer to

Muhlker *vs.* New York & H. R. Co., 197 U. S., 544; 49 Law Ed., 872.

A brief review of this case will, we think, show its applicability and force.

In 1882 and 1887 the Court of Appeals of New York decided the cases of Story *vs.* New York Elev. R. Co., 90 N. Y., 122; 43 Am. Rep., 146, and Lahr *vs.* Metropolitan Elev. R. Co., 104 N. Y., 268; 10 N. E., 528.

These cases established the law of New York to be that the dedication of a street or the taking of it by eminent domain did not carry with it the right to use the street for an elevated railway, and that, therefore, the damage of abutting property by such a use of the street, was both a damaging of property without prior compensation and a violation of the obligation of the contract of dedication. In 1888 one Muhlker purchased certain New York property. Thereafter the State sought to use the street for an elevated railway. Muhlker brought action to enjoin such use without prior compensation to him. The Court of Appeals held against him and the case was taken to this court. Justice McKenna reviewed the Story and Lahr cases and showed that the case before him was identical in every material point. This being true, and the plaintiff having bought his property while the earlier decisions were the unquestioned law, the State could not, by a change in its decision, deprive him of the right to compensation which existed when he purchased. To do so would be in violation of the obligation of a contract. The court said:

> "However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases and could not be taken from him without payment of compensation.
>
> "And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the

> measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

It seems to us that the case at bar is much stronger than the Muhlker case, for in our case not only was the property purchased while the law gave a right to compensation, but the property was platted and the city annexed it while such was the law. It should be noted that this court did not base its decision on the theory that the right to compensation in the particular case actually *was* property or actually *was* included in the contract of dedication. It bases its decision solely on the fact that at the time of the purchase such was the law of the State. So, in this particular case, it is immaterial, whether aside from the statute at the time of the platting, annexation, purchase, and injury, any such right existed. The material fact is that it *did* exist at such time. And, such being the law at those times, it entered into and became a part of the contracts of platting, annexation, and purchase, just as much as though written at length therein. The property was platted "as an addition to the city of Tacoma." Suppose there had been written thereon, "If the city of Tacoma, when it shall establish a grade for any street herein, which cut or grade requires any cut or fill damaging abutting property, etc., it may proceed, etc., following the requirements of the original statute." No one would dream of questioning that a contract was created. But, under the holdings of this court, the law then in force became as much a part of the contract as though it had been written out in full therein. For a statute must certainly be as much a part of the contract as a decision of a court.

And there is no practical difference between the holding in the Story and Lahr cases and the statute now under consideration. The New York court in the cases decided at the time of the purchase said that a dedication or a condemnation of street did not include a right to use it in a particular manner to the injury of the abutting owner. A right to compensation for such use, therefore, remained with him. The statute in this case in force at the time of the plat, the annexation, and the purchase said that if the city shall use the street in a particular manner to the injury of the abutting owner it shall compensate him therefor. The statute did not, in express words, declare that the contract of dedication or condemnation left such right in the owner. But it did not need to expressly say so, for if the dedication did *not* leave such right in the owner then the statute, though in force at the time of the dedication, became a dead letter by virtue *of* the dedication.

The cases are exactly parallel, and we contend that on this point our case is ruled not only by the principle involved in all cases holding substantive statutes affecting contractual rights to be a part of the contract, but by the express decision in the Muhlker case.

IV. PLAINTIFFS IN ERROR HAVE A CONTRACTUAL RIGHT TO COMPENSATION GROWING OUT OF THE FACT THAT THE ORIGINAL STATUTE WAS IN FORCE AT THE TIME OF THE AUTHORIZATION AND COMPLETION OF THE GRADE.

It is elementary that where a thing can legally be done only on performance of certain conditions, and the thing is done, the law will imply a promise to fulfill the condition, though none is explicitly given. Thus, if A receives B's money, to the possession of which he is lawfully entitled only if he intends to afterwards account therefor to B, the law will imply a promise on his part to render such account. And particularly would this be true where the thing done is

beneficial to the person acting and the condition to be fulfilled is payment of compensation to the one injured. So, if A continues in possession of B's premises after the expiration of a lease, the law will not treat him as an absolute trespasser, but will imply a promise on his part to pay rent so long as he continues in possession.

Our whole system of law and our written Constitution are so zealous in guarding property rights from legislative interference that examples are necessarily rare in which legislative authority to damage or use property is given to one person on condition of making recompense to the person injured. Eminent domain proceedings are almost the only instance. And these proceedings and the rights of the property owners thereunder are protected by special constitutional provisions, so that the necessity of invoking the implied promise and showing that it constitutes a contract within the protection of the Federal Constitution can rarely arise. But this is a case in which the damage originally suffered has been held by the State court to not be within the State constitutional prohibition against damaging without compensation, and where, therefore, we are thrown back on the Federal Constitution. And there is the best of precedent, as well as reason, for holding that where such authority to damage on making compensation is given by statute, and the damage is done, or even where compensation is required by statute for a benefit unaccompanied by damages to the person to be recompensed, the implied promise inherent in the statute may be successfully invoked. And this principle of contractual obligation must apply, of course, whether the particular damage for which the contract of recompense is made, falls within the eminent-domain clause of the State constitution or not.

On reason, the matter seems very plain. We are aware of the rule that the word "contract" in the Federal Constitution does not include claims for a pure tort, even though reduced to a judgmen.. But this is by no means a case of

a pure tort. The city *did* have authority to damage the property as it did, if it had only made compensation, even after the work was done. When it did the damage it entered into an implied "compact" with the owners that it would pay for such damage.

Healy *vs.* City of New Haven, 49 Conn., 394, emphasizes this particular point of the contractual obligation. In that case it appeared that there was in effect, at the time the grading was ordered and established, a law authorizing recovery by the abutting property owners. Subsequently, and prior to the actual digging of the grade, the law authorizing recovery was repealed. The question was raised as to whether this repeal deprived the property owner of the right to recover. As to this the court said:

> "We think the law is so that the statute as it existed when the improvement was undertaken or entered upon must determine the rights of the parties. *The presumption is that it was undertaken in view of the statute, the parties respectively accepting the privileges which it conferred and the liabilities which it imposed.* A contrary rule might operate as a trap."

The case at bar is much stronger than the Healy case, for in this case not only was the work ordered by the city engineer while the law unquestionably gave a right to compensation, but the work was actually done while the law was in such condition. To hold that the change of the law affected plaintiffs' rights would be indeed, as the Connecticut court said, to make it operate as a trap and to violate the implied contract under which it was performed.

And the contractual obligation arising from such an implied contract is protected by the Federal Constitution.

Steamship Co. *vs.* Joliffe, 2 Wall., 450; 17 L. Ed., 805, involved this point. California had passed a statute requiring the payment of half pilotage fees to any pilot who hailed a vessel in San Francisco harbor and whose services were declined. Pending an action by a pilot based on this law

the statute was repealed, and the same claim was made there that is made here, that the action being statutory it fell with the repeal of the statute. As to such contention this court said:

> "If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. *The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention, which is an essential ingredient of an actual contract, is often wanting.* Thus, if a party obtain the money of another by mistake, it is his duty to refund it, not from any agreement on his part but from the general obligation to do justice which rests upon all persons. In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one; and the liability thus arising is said to be a liability upon an implied contract." * * *
>
> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

And distinction which can be drawn between that case and the case at bar is in favor of the present case. For if the obligation of an implied statutory contract, forced by the statute upon one who receives no actual benefit from it, will be protected by the Federal Constitution and become a vested right, how much more will the implied obligation

of a statutory contract, voluntarily assumed, be protected for the benefit of the owner, whose property, without his consent, has been actually damaged thereunder. The Healy case shows that there *was* an implied contract. The Joliffe case shows that such a contract is within the *protection* of the Federal Constitution. And both cases are founded on sound reason.

We respectfully submit, therefore, that the repeal of the law of 1907 could not affect the right of recovery in this action, as to give the law an effect which not only deprives plaintiffs in error of their property and vested rights, but also violates the obligation of the contract entered into when the property was platted, annexed, and purchased; and executed, so far as plaintiffs are concerned, when the work was ordered and the damage actually done by the city and its agent in the construction of the grade.

V. THE REPEAL OF LAWS OF WASHINGTON, 1907, CHAPTER 153, SECTION 48, NOT BEING SUFFICIENT UNDER THE FEDERAL CONSTITUTION TO DIVEST THE RIGHT OF RECOVERY, THE CASE MUST BE REVERSED.

The Supreme Court of Washington has in this case interpreted the section in question as broad enough in its terms to cover the case presented of a city establishing and completing a grade in a street coming into the city, after the action taken by the board of county commissioners shown in this case. We quote from the opinion in this case:

> "This is an action instituted by plaintiffs to recover damages *consequent upon grading certain streets in the city of Tacoma.* Under sec. 47, chap. 84, Laws 1893; sec. 48, chap. 153, Laws 1907, such damages *were recoverable.*"
>
> Ettor *vs.* Tacoma, 57 Wash., 50.

We see no other reasonable construction of this language than that, under the statute, the damages sought to be re-

covered in this action were recoverable. The record sent up to that court, as appears by the record here, fairly presented the question as to whether the section applied to the case involved. In our opening brief we set out the section with its provisions that whenever a street or its control "shall belong to any city," and it shall desire to "establish a grade therefore," it shall follow the procedure therein outlined. We then referred to the doctrine of the Fletcher case, and said:

> "There is no distinguishing feature between that case and the case at bar. * * * Defendants in the lower court urged that the work was authorized before the street and property affected became a part of the city, and that therefore *the section quoted was not applicable.* Such contention was absolutely without merit."

Such statement of the legal proposition was followed by several pages of argument. In response to this, the court decided that the damages which we sought "were recoverable" under the statute. We do not see how this can be considered otherwise than a construction of the statute as broad enough to cover the circumstances of our case. Being such a construction by the highest court of the State, and not involving any question as to the applicability of the Federal Constitution, this court will follow it even if there were any reasonable doubt as to its being correct.

Had the question been as to the application of the Federal Constitution to one branch of the case as well as another, this court, in support of the judgment, might have reviewed such finding. But, being a mere holding as to the scope of a State statute, and the construction in no way involving the application of the Federal Constitution, we contend that such construction is conclusive and that the only question in the case not involved in the application of the Federal Constitution is thus conclusively settled in our favor by the interpretation placed by the court on the statute on which we rely.

If we are mistaken, either as to the scope of the State court's decision, or as to its binding effect on this court, still the determination of the point anew and on its merits would result in the same conclusion. We are so well satisfied on this point that we will not repeat our argument thereon already appearing in the printed record containing both our opening and reply briefs, but will content ourselves with merely citing a few cases which conclusively show that the law as to compensation for street improvements is the law governing the property at the time the work is finally authorized and done, rather than the law governing the street when the negotiations concerning the improvement were commenced. And this regardless of whether the law became different by an annexation of the property pending the negotiations for the improvement, or by a change in the law itself.

Triest *vs.* City of New York, 193 N. Y., 525; 86 N. E., 549.
Healy *vs.* City of New Haven, 49 Conn., 394.
Bloomington *vs.* Pollock, — Ill., —; 31 N. E., 146.
St. Louis *vs.* Lang, — Mo., —; 33 S. W., 54.
Gilpin *vs.* City of Ansonia, 68 Conn., 72; 35 Atl., 777.

See also Ill. Cent. Ry. Co. *vs.* Chicago, 176 U. S., 646; 44 Law Ed., 622, as to the effect of annexation of streets by a city prior to the vesting of rights, *which might have* become vested before the annexation. The Triest case, *supra*, seems conclusive of the matter; and the other cases cited, while not so nearly identical as to facts, are all based on principles equally determinative of the question.

Plaintiffs in error, therefore, insist that the record in this case shows them to have an unquestioned right of recovery under the statute of 1907.

VI. THE STATUTE OF 1907 BEING APPLICABLE, BOTH OF THE DEFENDANTS IN ERROR ARE RESPONSIBLE TO PLAINTIFFS IN ERROR FOR THE DAMAGE SUFFERED.

The holding of the State court, affirming the judgment as to the railway company, necessarily involves a holding that its act in grading the street was authorized either by the city or by the prior action of the board. If it was not authorized at all the court would have necessarily found the railway company liable for the unauthorized damage which it wrought. We have already discussed the theory that the action was authorized by the prior action of the board, and found it to be ill-founded. It must, therefore, be conceded that the acts of the railway company were authorized by the city. It follows that the grading was the act of the city by its agent the railway company, and that the city is liable if, as we have shown to be the fact, the act of 1907 applied.

Is the railway company also responsible under such circumstances? We contend that it is, and for two reasons:

First. The act authorized by the city was itself, in view of the refusal to carry out the provisions of the act of 1907, an illegal act, for which the agent as well as the principal is liable. The cases where contractors, as the railway company is here, have by direction or authority of the city done illegal acts in the streets, are generally against the city alone. But in reason it would seem that the contractor should also be liable. The fact that one has been ordered to do a wrong, or has contracted to do it, does not excuse the wrong.

Hatch *vs.* Olympia, etc., Ry. Co., 6 Wash., 7, is directly in point. In that case the statute provided that the city might authorize the laying of railway tracks in a city, but no railroad track should be there laid until the injury was compensated and paid for. The court held that even though an ordinance was passed authorizing such use of the streets,

still the railway company would be liable. In its discussion the court used the following language:

> "The city, under its charter, had not itself the right to change the grade of streets without paying the damages resulting therefrom to owners of abutting property who had made improvements thereon with reference to the established grade, and therefore could not legally authorize the railroad company to do so."

Second. While the prior action of the board did not authorize the grading and damage without subsequent action by the city, yet the record shows that the city, in making the railway company its agent for the construction of the grade and in vacating the streets referred to in the order, adopted as its own the original proceedings, except as necessarily modified by the laws and statutes governing the grading of streets by cities of its class. When the city, by its engineer, ordered the work to be done in a certain manner, and vacated "M" and "N" streets, and the railway company accepted such vacation and built the grade as directed by the city, they impliedly agreed that their rights and liabilities, the one to the other, should be as set out in the order of the board. One of these provisions was that the grading of the street should be at the railway company's "own expense, and without cost or charges to or upon the said county of Pierce." Under the statute governing the city, which by the mutual acceptance of the parties succeeded in the contract to the county of Pierce, a part of this expense so contracted to be paid was payment of compensation to the property owners. The railway company has, therefore, by proceeding as though the original order of vacation were a contract between itself and the city, agreed to pay plaintiffs in error for the injury which they would sustain. The promise was obviously not only for the benefit of the city, but for the benefit of the property owners, and they may rely upon it in an action to recover such damages.

This is not only the universal rule in the United States, but is made positive by the provisions of the Washington Code that "Every action shall be prosecuted in the name of the real party in interest," except as otherwise specially provided.

Remington & Ballinger's Code of Washington, section 179.

Conclusion.

It, therefore, appears that the repeal of the act of 1907 could not effect the right of recovery in this action; that under such act the right of recovery existed, and that each of the defendants in error is liable in this action for such recovery. We therefore respectfully ask that the judgment of the State Supreme Court be reversed, and that the case be remanded for further proceedings in accordance with the law.

Respectfully submitted,

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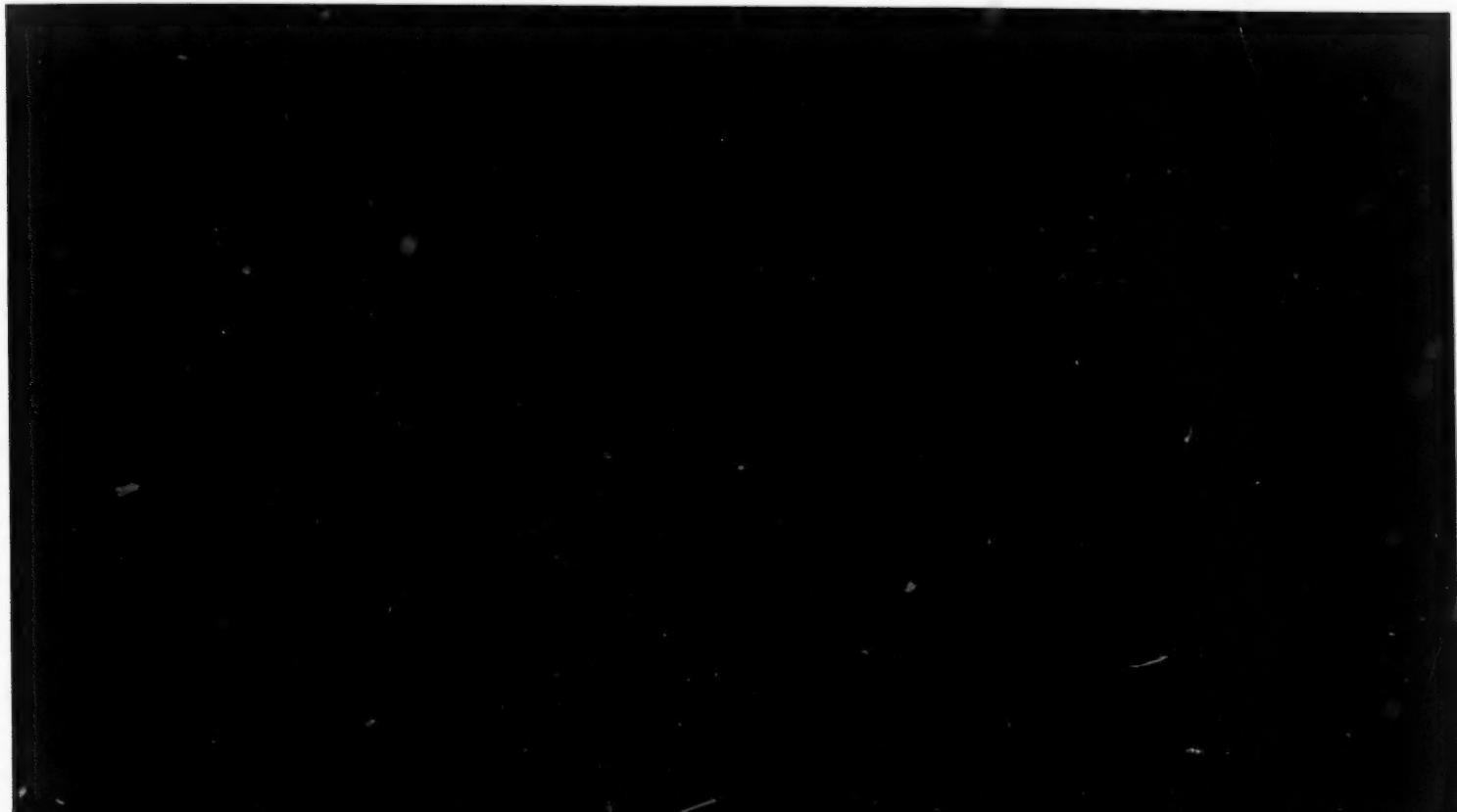

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

MANLEY ETTOR, *et ux*,
Plaintiffs in Error,

vs.

CITY OF TACOMA *et al.*,
Defendants in Error.

No. 68.

BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF FACTS.

There is but one question to be presented for the consideration of this Court, viz.:

DID THE SUPREME COURT OF WASHINGTON ERR IN HOLDING THAT NO SUBSTAN-

TIAL RIGHT OF PLAINTIFFS IN ERROR, UNDER THE CONSTITUTION OF THE UNITED STATES, HAD BEEN VIOLATED BY THE ACT OF THE LEGISLATURE OF THAT STATE IN 1909 (Laws of 1909, p. 151, Rem. & Bal. Code, Sec. 7815), amending Section 48, of Chapter 153, of the Laws of 1907?

The State of Washington, through the decision of its court of last resort, adheres to the doctrine that the dedication of land to public use for a street, as by a plat, constitutes an agreement on the part of the dedicator that the public may thereafter do what is necessary in the way of grading or filling to make a passable street, without liability to abutting land owners for consequential damages.

Fletcher v. Seattle, 43 Wash. 627;

Ettor v. Tacoma, 57 Wash. 50.

In taking that position it followed the principles announced by this Court in

Smith v. Corporation of Washington, 20 Howard 135;

Sauer v. New York, 206 U. S. 536.

So deciding, the Washington court in this case held that because there had been no right of action until the statute created it, the repeal of the creative statute defeated the pending action.

Plaintiff in error, admitting that his right of action was founded upon the statute alone, disputes

that position, and claims that his right of action could not be taken away once it had accrued.

Jefferson Branch Bank v. Skelly, 66 U. S. 431, cited by plaintiffs, could only become applicable when it should be held that the 47th section of the Act of 1893 made a contract between the state of Washington and all land holders and lot owners (which should be irrevocable) that no street grade could be made in front of their property without the payment of consequential damages.

The same remarks apply to *Bridge Proprs. v. Hoboken S. & I. Co.*, 68 U. S. 116; *Chicago B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, and *Douglas v. Kentucky*, 168 U. S. 488.

But plaintiff does not attempt to claim or show that the statute made a contract between the state and the land or lot owner; his point III. merely endeavors to argue that because of the statute the City's liability for damages carried with it a contractual obligation that it would pay damages, if any, whenever it graded a street; which is a very different proposition.

It cannot be successfully contended that the liability of the City while the statute existed was in any sense contractual.

It is for defendants in error to support the decision of the court below, and inasmuch as the two opinions of the Supreme Court of Washington so

completely and effectually cover every proposition at issue here, this brief will be found to be a close imitation of those opinions, with only such verbal departures as the circumstances make necessary.

The right claimed to have been taken away was wholly statutory.

But the repeal of a statute creating a right of action, without a saving clause, takes away all right to proceed, and the repealed act is considered as if it had never existed except for the purpose of those actions or suits which have been prosecuted and concluded while it was an existing law. This is axiomatic, so that it is held that a repeal after decision, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to a higher court charges the appellate court with the duty of declaring the litigation ended without right of further prosecution.

"This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may, therefore, reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by absolute repeal."

Vance v. Rankin, 194 Ill. 625.

"It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the re-

peal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after."

South Carolina v. Gaillaud, 101 U. S. 433.

See in support of this rule:

Cooley, Const. Lim (7 Ed.) 544;

2 Sutherland Stat. Const. (2 Ed.) 285;

Endlich, Interp. of Stat., Par. 478, 479, 480;

22 Am. & Eng. Ency. of Law, 745, 752;

Hampton v. Commonwealth, 19 Pa. St. 329;

Sumner v. Cummings, 23 Vt. 427;

Taylor v. Strayer, 78 N. E. (Ind.) 236;

Andig v. Levi, 57 Miss. 58;

Riley v. City, 92 N. W. (Ia.) 887;

Century Digest Title "Statutes," Vol. 44, Col. 2975;

Cope v. Hampton County, 19 S. E. 1018.

Plaintiffs' citation of *Muhlker v. Railroad Co.*, 197 U. S. 544; *Steamship Co. v. Joliffe*, 2 Wall 450, and *Sauer v. New York*, 206 U. S. 536, is not persuasive. To make them of any force it must be assumed that the action for damages would have lain although there had never been a statute giving compensation for consequential injury resulting from an original grade, and that Chapter 80 of the Laws of Washington of 1909 was void if it could be given a retrospective effect.

The Muhlker case grew out of a condition theretofore unknown to the courts of this country. It had been held by the Supreme Court of New York

that light and air coming from a street could not be taken from the adjacent property owner without compensation by an elevated railroad company. Subsequently one Muhlker acquired certain property fronting on a street over which the track of the railway was constructed. It was laid on or below the grade of the street, but by an act of the legislature the company was authorized to change it to an elevated road. The company claimed immunity from damages under its original grant of a right of way and the subsequent act of the legislature. The state court held with the company. That judgment was reversed by this Court.

Cases which will perhaps be cited by plaintiffs are the following, which will not, however, support its appeal to this Court:

A common law right of action which has become vested is, of course, not affected by legislative action, especially where the foundation of the right is a fraud or fraudulent practice, as in *Angle v. Chicago & Co.*, 151 U. S. 65. It was not even claimed in that case that the action of the legislature had affected Angle's right of action.

In *Westerfelt v. Gregg*, 12 N. Y. 211, the husband's rights did not depend upon any statute, but upon the laws governing the rights of married persons as administered by the courts of New York.

In *Stevens v. Marshall*, 3 Pinney (Wis.) 203, the mill owner could not, at common law, flood the lands

of the other proprietor without being liable for damages, and to an injunction as well. He was bound to pay damages in either case, but, under the statute, he had practically the right of eminent domain; that is, he could, by paying enough damages, have the perpetual right of flowage.

Nor does the *City of Elgin v. Eaton*, 83 Ill. 535, furnish anything better, for the City had taken Eaton's land by entering upon it, and it was proposing to keep the land without paying for it, which it could not do without either statute or constitutional provisions.

In *Graham v. C., M. & St. P. Ry. Co.*, 10 N. W. 609 (Wis.), the court said:

"This court has held that a right of action, whether civil, penal or criminal, expressly given by statute, is destroyed by its repeal, unless there be a saving clause in the repealing statute which preserves the right to the plaintiff. The repeal destroys all such rights of action, whether commenced and pending at the time for repeal or not"—citing fourteen cases from Wisconsin reports.

The statute in that case prohibited a charge from Muscoda to Milwaukee of more than 19 cents per 100 pounds on grain, and allowed a recovery of three times any excess charged. The company charged 25 cents, and the suit was commenced to recover three times the 6 cents excess. The legislature repealed the triple damage provision, but the rate limit stood, and a recovery for 6 cents was sustained be-

cause of the wrong which had been done by exacting an unlawful rate.

In none of these cases was the right of a city to make an original grade of its streets involved, nor was the right of the legislature to abridge or abrogate a right given by statute considered or questioned.

In *Steamship Co. v. Joliffe* a claim arose under the pilotage law of California. After a right of action had accrued, the statute upon which it was founded was repealed. The court said:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

This is the undoubted rule as between individuals when rights have accrued under contract or quasi contract, but it has never been extended so as to preserve a right of action against the public when the right is not based upon contract, but is asserted because it accrued at a time when the right of sovereignty was temporarily surrendered. A case involving the same principle was before the Supreme Court of Oregon.

Ladd v. City of Portland, 32 Ore. 271.

Under an original charter a city was authorized to improve streets at the expense of abutting property owners, but it was provided that when a street

"has become improved under and by virtue of the provisions of this chapter, thereafter such street or part thereof shall not be subject to be again improved, but may be repaired." Thereafter the city was consolidated with others, and a new charter was passed, "all vested rights being reserved." Thereafter the council proceeded to, and did, improve the street and assessed the cost to the abutting property. An action was brought to restrain the collection of the tax, the contract clause of the federal constitution being invoked. The court held:

"The Supreme Court of the United States, in interpreting the clause of the constitution now under consideration, has always taken the terms thereof in their ordinary meaning, and holds that the word 'contract,' as used therein, means a voluntary agreement of minds upon a certain consideration, to do or not to do certain things: *Murray v. Charleston*, 96 U. S. 432; *Louisiana v. Mayor etc. of New Orleans*, 109 U. S. 285 (3 Sup. Ct. 211); *Fisk v. Jefferson Police Jury*, 116 U. S. 131 (6 Sup. Ct. 329). And in our opinion the legislation in question has none of the essential ingredients of such a contract. The power to assess the costs of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations; but it is 'never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms': *Philadelphia Railroad Company v. Maryland*, 51 U. S. (10 How. 394). And even then, if the exemption is not supported by some consideration it may be revoked at any time: *Rector etc. of Christ Church v. County of Philadelphia*, 65 U. S. (24 How.) 300. * * * The manifest purpose of the provision of the charter

under consideration was to define the mode and extent of the power of the council in the matter of street improvements, and the limitation on the exercise of such power was a mere concession to the citizen, and an act of grace, and not a contract by which the state forever relinquishes the sovereign power of taxation. It was a limitation voluntarily imposed by the legislature upon the powers of the city, which that department of the state government could remove at any time public policy or the interests of the municipality might seem to demand, and bound the state only so long as the statute remained unrepealed."

The sum of the matter is this:

This Court held in *Smith v. Washington, supra,* that no action would lie for consequential damage to abutting land caused by the grading of a street in front of it.

The constitution of Washington, Article I., Section 16, prohibits the taking or damaging of property without compensation.

The Supreme Court of Washington declared that when land was dedicated for a street there was an implied contract that the street might be graded either up or down, as the nature of the surface required; and that such a grade was not a "damaging" of abutting property within the meaning of the constitution. The legislature, by a most palpable mistake, hidden away in a long act upon the subject of eminent domain by cities, nevertheless conferred a right of action for such damages.

With the exception of the Fletcher case (43 Wash.

627), these are the only cases which have arisen in the state under the statute. The Fletcher case was a discovery not made until a petition for rehearing was filed. As soon as the attention of the legislature was called to the evident blunder its predecessor had made, it repealed the statute, with an emergency clause putting the repeal in effect at once.

Under all authority and upon the best reason it is submitted that the case should be affirmed.

Respectfully,

HEMAN H. FIELD,
Attorney for Defendants in Error.

GEORGE W. KORTE, Attorney for C., M. & St. P. Ry. Co.,

T. L. STILES, City Attorney for the City of Tacoma,
Of Counsel.

(22,212)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 69.

EDWIN HOWARD AND EMMA HOWARD, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

CITY OF TACOMA AND CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1912.

a 8381.

Filed Sep. 29, 1909.

C. S. REINHART, *Clerk*.

Entered.
App. Doc. No. —.
Page —.

b In the Superior Court of the State of Washington in and for the County of Pierce.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Defendants.

Transcript to the Supreme Court.

No. 27364.

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1 In the Superior Court of the State of Washington in and for Pierce County.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants.

Amended Complaint.

Comes now the plaintiffs and for their cause of action against the above named defendants, allege as follows:

I.

That the city of Tacoma is a municipal corporation of the first class under the laws of the state of Washington.

II.

That during all the times herein mentioned, the defendant Chicago, Milwaukee & St. Paul Railway Company, was and is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, and that it has duly complied with all the provisions of the laws of the said state in respect to railway coporations that it is authorized by its articles of incorporation to locate, build and equip, run and operate a steam railway for the carriage of freight and passengers, extending from convenient points within the cities of Tacoma and Seattle, in said state, in an easterly or southeasterly direction to the eastern boundary line of said
2 state; that it is authorized to acquire land, rights and easements in said state, by purchase or by the exercise of the right of eminent domain, for the use and purposes of the railroad aforesaid; that said defendant had theretofore definitely located and adopted the route of its railway, through the county of Pierce and through Indian Addition hereinafter mentioned, and in the city of Tacoma, and has heretofore acquired land in said city and county and said Indian Addition for right of way, depot and terminal grounds to be used in the transaction of its business as a common carrier; that prior to the first day of June, 1906, it was the owner in fee simple of all of blocks 7538, 7540 and 7542, of what was then known as Indian Addition, in the county of Pierce, state of Washington, said Indian Addition being unincorporated territory; that said Indian Addition at said time, and all the times prior to the 19th day of August, 1907, was a part of the county of Pierce in the state of Washington, and was not lawfully a part of any city or said city of Tacoma, Washington, for any purpose whatsoever; that at said time, in said Indian Addition, there was lawfully laid out, dedicated and established and existed, certain highways and streets, among others, "M" and "N" streets and 25th and 26th streets, said "M" and "N" streets running parallel with each other and 25th and 26th streets running parallel with each other but in the opposite direction to said "M" and "N" streets and intersecting said "M" and "N" streets at said blocks 7538, 7540 and 7542.

That said defendant as owner in fee of all of said blocks 7538, 7540 and 7542 did on the — day of June, 1906, petition the board of county commissioners of the county of Pierce, for the vacation of all those portions of "M" and "N" streets in said Indian Ad-
3 dition lying between blocks 7538, 7540 and 7542 aforesaid, and plaintiff attaches hereto a copy of its said petition for vacation, marked Exhibit "A" and made a part of this complaint.

III.

That said railway at said time proposed and since has constructed its road along a line over and across said "M" and "N" streets be-

tween 25th and 26th streets at right angles to said "M" and "N" streets; that the purpose and object of securing the vacation of said "M" and "N" streets by defendant railway company as aforesaid, was to avoid street crossings on said "M" and "N" streets, and thus enable said railway company to operate its road when constructed, more advantageously with less expense, and less danger to life and property, and also to secure the ground of said street which it proposed to use and which it has since taken possession of as a railroad right of way; that the vacation sought and requested by said petitioner in his petition was for its sole use and benefit; that at the time of filing said petition, 25th street was a graded street and "M" and "N" streets were graded streets and were then used as a highway or roadway by the public generally and by these plaintiffs. That on the hearing of said petition it was agreed by and between the said county commissioners and the said railway company, that it would vacate said portion of said "M" and "N" streets petitioned for on the conditions named in Exhibit "B" hereinafter referred to; that in pursuance of said petition and said agreement just mentioned, the said board of county commissioners duly authorized by law, acted upon the same and made an order or writing, a copy of which order or writing is hereto annexed and marked Exhibit "B" and by such reference is made a part of this complaint; that nothing fur-
4 ther was done by the said board of county commissioners in reference thereto, other than the making of the order or writing above mentioned, that said board of county commissioners never made any order for the construction of any road on South 26th street or plank sidewalk on the side thereof; that said board of county commissioners never furnished to defendant company any plans either proposed by it or approved by it for the construction of said roadway on 26th street; neither did the county surveyor ever furnish the defendant railway company any plans or specifications for the improvement of a roadway on said 26th street; that subsequent thereto and on or about the 19th day of August, 1907, in pursuance of chapter 245 of the laws of 1907, of Washington, said Indian Addition was voted in and duly annexed to the city of Tacoma, by proper ordinance and for the first time belonged to the city as a part thereof; that on said 19th day of August, the said city of Tacoma, a municipal corporation, acquired full jurisdiction and authority over all the streets and alleys in said Indian Addition including 26th street and "M" and "N" streets and took possession of said streets for and on behalf of the public.

IV.

That on or about the — day of May, 1908, the defendant the Chicago, Milwaukee & St. Paul Railway Company, without any order or direction from the board of county commissioners of Pierce county, or the city of Tacoma, commenced to change the surface of said South 26 street between east "L" street and east "P" street in said Indian Addition by making excavations and fills therein, and thereupon notified the city of Tacoma, through its commissioner of pub-

lic works and city engineer of its intent to grade said streets
5 and change the surface thereof under the purported authority of law and order of the board of county commissioners of Pierce county, heretofore referred to, and thereupon the commissioner of public works of the city of Tacoma, the city engineer and the members of the city council of said city of Tacoma, inspected said proposed work and made and directed said changes in the proposed plan for constructing the roadway in said street, increasing the height of the fills and the depth of the cut proposed to be constructed by said railway company and directed that said work be done under the direction of the commissioner of public works and city engineer of said city.

V.

That thereupon and in pursuance to the verbal orders and directions of the commissioner of public works and city engineer of said city of Tacoma, and with the knowledge consent and acquiescence of the city council of the said city of Tacoma, and the mayor of said city, the defendant, the Chicago, Milwaukee & St. Paul Railway Company, changed the natural surface and grade of said South 26th street from east "L" street to east "P" street, by constructing a roadway thirty feet in width and in many places, making cuts thirty feet wide and from five to twenty feet deep and in other places making and constructing fills thirty feet wide and from five to ten feet high.

VI.

Plaintiffs allege that no ordinance was ever passed by the city council of the city of Tacoma, establishing a grade on said South 26th street from east "L" street to east "P" street and that said street was not improved and said roadway not constructed in con-
6 formity with any grade established on said street by ordinance of the city of Tacoma, and the city council of the city of Tacoma, did not authorize the grading of said street and the changing of the natural surface thereof by the said railway company by any ordinance or resolution passed by said city council, but all of said work and improvement was done by the said railway company under the unlawful and wrongful oral direction of the commissioner of public works, city engineer and city council of said city of Tacoma, but that said improvement and grading was done by said railway company under a pretense of complying with the provisions of the order of the board of county commissioners of Pierce county hereinbefore set forth, for the purpose of obtaining possession of the portions of "M" and "N" streets sought to be vacated by said board of county commissioners.

VII.

That after said work was completed, the said city of Tacoma, without the passage of any ordinance or resolution, adopted and approved of the work so done by said railway company by accepting the benefits thereof and using said east 26th street as a public street and exercised supervision over said street and used said street for its

own purposes and permits the public at large to use the same as a thoroughfare. That said city of Tacoma, has treated the said part of said "M" and "N" streets above mentioned and now occupied by defendant railway company as vacated and has permitted the railway company to take possession of it and use it as its own property in consideration of said railway company having constructed and built said roadway on South 26th street between east "L" and east "P" streets as aforesaid and as soon as the said railway company has constructed said roadway on 26th street and in considera-
7 tion of its having so constructed said roadway, defendant city surrendered such part of "M" and "N" streets aforesaid to said railway company. That said portions of said "M" and "N" streets are now closed and the public at large are not permitted to use the same. All of which was done without lawful authority in the premises and to the great injury of these plaintiffs. That the plaintiffs are the owners of the lots hereinafter described and said lots at all times herein mentioned faced upon South 26th street between east "L" and East "P" streets and were prior to the construction of said roadway on a level with said South 26th street and the owners and tenants had easy and convenient ingress and egress to and from said lots and street.

VIII.

That South 26th street is sixty feet wide, and the roadway as constructed, thirty feet wide, is in the center of said street; that said property of these plaintiffs hereinbefore mentioned and owned by these plaintiffs is lots 5 & six (6) in block 7637, Tacoma Land Company's Seventh Addition to Tacoma; that said lot is twenty-five by one hundred and twenty feet; that during all the times herein mentioned, plaintiffs had upon said lot a dwelling house occupied by plaintiffs; that the defendant company in constructing said roadway, made a cut in front of the premises of these plaintiffs thirty feet wide and eighteen feet deep, thereby causing an obstruction to plaintiffs' ingress and egress to and from said lot and entirely depriving plaintiffs of the use of said street or access thereto from their property, and leaving the residence of said plaintiffs on a high embank-
ment above the roadway so constructed on said street, without
8 any means whatever of obtaining access to said roadway from said premises rendering said property unsightly and undesirable and greatly depreciating the value thereof; that by reason of the construction of the roadway by these defendants, plaintiffs have been damaged in the sum of three thousand dollars ($3000.00);

Wherefore, plaintiffs pray judgment of and from the defendants and each of them in the sum of three thousand dollars ($3000), besides the costs of this action.

BOYLE, WARBURTON, QUICK & BROCKWAY,
Attorneys for Plaintiffs.

STATE OF WASHINGTON,
County of Pierce, ss:

Stanton Warburton, being first duly sworn on his oath, deposes and says, that he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and believes the same to be true; that the reason that affiant makes this verification, is the fact that all the facts and material allegations of the complaint are within the personal knowledge of affiant.

STANTON WARBURTON.

Subscribed and sworn to before me this 7th day of November, 1908.

JOHN M. BOYLE,
Notary Public.

9 EXHIBIT "A."

To the Board of County Commissioners of Pierce County, State of Washington:

The petition of the Chicago, Milwaukee and St. Paul Railroad Company of Washington, states as follows:—

1. That it is a corporation duly organized and existing under the laws of the state of Washington, and is authorized to locate, construct, maintain and operate a steam railroad for the carriage of freight and passengers from points within the city of Tacoma, to the easterly boundary line of the state of Washington.

2. That said company has located its line of railroad through the county of Pierce, and to and within said city of Tacoma, and has acquired the greater portion of its right of way for said line of railroad in said county, and has also acquired lots, blocks and tracts of land in said city of Tacoma, and adjoining that city, to be used for right of way for main and side tracks, yard and terminal grounds, freight, houses, warehouses, and other buildings and structures required for carrying on its business as such common carrier; that its main line of railroad as located and staked out, extending from the north line of Pierce county, to the city of Tacoma, crosses the Puyallup river on lot one (1) section ten (10) township twenty (20), north, range three (3) east, W. M., and extends in a westerly direction across Indian tracts two (2) twenty (20) twenty-one (21), blocks 7548, 7646, 7645 and to and upon block 7542, all in the Indian Addition to the city of Tacoma; that said company has acquired a right of way across said Indian tracts and said blocks 7548,
10 7646 and 7645 and has also acquired all of blocks, 7542, 7540 and 7538 of said Indian Addition, and other property within the city limits of said city of Tacoma, upon which to construct, maintain and operate main and side tracks, warehouses, freight houses, and other buildings and structures to be used in the transaction of its business as a common carrier and is the owner in fee of all of said blocks 7542, 7340 and 7538; that said railway company desires the vacation of those portions of "M" and "N" streets in said Indian Addition, as shown by the plat of said addition on file

in the office of the county auditor of Pierce county, and particularly described as follows:

All that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540 produced across said "M" street;

All that portion of "N" street lying between blocks 7540 and 7542 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7540 and 7542, produced across said "N" street, each of the portions of said streets so to be vacated being a strip one hundred thirty (130) feet in length and eighty (80) feet in width.

3. Said railway company further states that said vacation is desired for the purpose of constructing, maintaining and operating main and side tracks, yards and terminal grounds, upon, over and across the portions of said streets hereinbefore described, and for erecting and maintaining freight houses, warehouses and other buildings and structures thereon, or upon parts thereof, all
11 be used in the transaction of its business as a common carrier;

Wherefore, petitioner prays this honorable Board that all those portions of said "M" and "N" streets, hereinbefore described, be vacated in the manner provided by law; that this petition be heard and determined at the sitting or session of said board of county commissioners to be held on the 22nd day of June, A. D. 1906, at 10 o'clock A. M., or as soon thereafter as the same may be heard; and that, in the meantime, notice of the pendency of said petition, be given, as provided by law.

Dated June 1st, A. D. 1906.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF WASHINGTON,

By H. R. WILLIAMS, *President.*

Attest:

[SEAL.] E. W. COOK, *Secretary.*

STATE OF WASHINGTON,
County of King, ss:

H. R. Williams, being first duly sworn, deposes and says that he is the president of the Chicago, Milwaukee and St. Paul Railway Company, of Washington, and makes this verification on its behalf; that he has read the foregoing petition and knows the contents thereof; and that he believes it to be true.

H. R. WILLIAMS.

Subscribed and sworn to before me this 1st day of June, A. D. 1906.

[SEAL.] F. M. BARKWILL,
Notary Public in and for the State of Washington, County of King, Residing at Seattle Therein.

12 EXHIBIT "B."

In the Matter of the Vacation of Portions of "M" and "N" Streets, Indian Addition, Pierce County, Washington.

This matter coming on for hearing on this the 13th day of October, A. D. 1906, and it appearing to the board of county commissioners by the records and papers on file herein, that a petition asking for the vacation of parts of certain streets as hereinafter described was filed by the Chicago, Milwaukee and St. Paul Railway Company, of Washington, with the said board of county commissioners, and that on the 1st day of June, 1906, notices of the filing of such petitions asking for such vacations were duly posted, all as required by law, and the time set for the hearing of said petition, to-wit: on the 22nd day of June, 1906;

That on said date said matter was heard, and at said time certain protests and objections to the vacation of said streets was made and filed, and duly considered by the board, and thereafter said matter was continued from time to time.

Now, therefore, the said board of county commissioners being fully advised in the premises,

Do hereby order, subject to the terms and conditions hereinafter set forth; that all that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540 produced across said "M" street; and also all that portion of "N" street lying between blocks 7540 and 7542 of said Indian addition and between the south line of South 25th street and the north line of the alley

13 running east and west along the south side of said blocks 7540 and 7542, produced across said "N" street; each of said portions of said strip being a strip of land one hundred and thirty (130) feet in length and eighty (80) feet in width, all as shown on map or plat of the Indian addition to the city of Tacoma, filed for record in the office of the auditor of the county of Pierce, on the 1st day of May, 1906, be and the same are hereby vacated, and the said strips of land above described so vacated are hereby attached to the lots, blocks and parcels of land abutting on the said streets so vacated.

This order of vacation is made subject to the following terms and conditions:

I.

That the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall, before this order of vacation becomes operative, at its, or their own expense and without cost or charges to or upon the said county of Pierce, improve South 26th street between East "L" street and Bay street in Indian addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory roadway thirty feet in width along the center of said South 26th street between said limits, and by laying and con-

structing a good and sufficient plank sidewalk on one side of said South 26th street as directed by the said board of county commissioners of Pierce county, from said east "L" street to East "P" street, in said Indian Addition.

The work and improvement shall be done upon order of the said board of county commissioners and according to plans prepared or approved by the said board of the county surveyor of said Pierce county, and to the satisfaction and approval of the said board
14 of county commissioners of Pierce county, and shall in any event be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or take exclusive possession of said vacated portions of "M" and "N" street-, and shall be done within thirty days after being notified by said board to do said work and improve said street.

II.

The said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall pay all damages which the county of Pierce may become liable for resulting to any person, persons, firm or corporation, or property, by reason of such vacation, and the said railway company, its successors and assigns shall forever hold the said county of Pierce harmless from all such claims and damages.

III.

Upon the failure of the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, to comply with all of the above terms and conditions the said vacations shall become null and void and of no force and effect.

STATE OF WASHINGTON,
County of Pierce, ss:

I, I. M. Howell, county auditor, in and for Pierce county, state of Washington, do hereby certify that the foregoing is a full, true and correct copy of an order of the board of county commissioners, dated October 13, A. D. 1906, and can be found in volume 26, p. 409, of the Commissioner's Record.

15 In witness whereof, I have hereunto set my hand and affixed my official seal this 31st day of October, A. D. 1906.

I. M. HOWELL,
County Auditor,
[SEAL.] By A. J. WEISBACH, *Deputy.*

Filed in Superior Court Nov. 17, 1908. J. F. Libby, Clerk. By McK. Deputy.

16 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD et al., Plaintiffs,
vs.
CITY OF TACOMA et al., Defendants.

Stipulation.

It is hereby stipulated by and between the above named parties that the annexed map may be considered a part of plaintiffs' complaint and that portion of the map to the east of the red line, is Indian Addition and that to the west, is Tacoma Land Company's First Addition and Tacoma Land Company's Seventh Addition; that the Tacoma Land Company's Seventh Addition was laid out and platted, together with all its streets and alleys, including South 26th street, prior to the 12th day of August, 1891, and that said Addition was regularly dedicated to the public, together with all its streets and alleys, including said South 26th street, by the Tacoma Land Company, who then owned it and that the plaintiffs' complaint may be interlined to the same effect, showing that at all the times mentioned in plaintiffs' complaint, the Tacoma Land Company's Seventh Addition was a part of and within the boundary of the city of Tacoma.

BOYLE, WARBURTON & BROCKWAY, *Attorneys for Plaintiffs.*
GEO. W. KORTE,
H. S. GRIGGS,
Attorneys for Defendants.
T. L. STILES,
Att'y for Def't City of Tacoma.

Filed in open court, Dep't No. 3, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Sweet, Dep.

(Here follows map marked p. 17.)

MAPS

TOO

LARGE

FOR

FILMING

18 In the Superior Court, Pierce County, Washington.

No. 27364.

EDWIN HOWARD et ux., Plaintiffs,
vs.
CITY OF TACOMA & CHICAGO, MILWAUKEE & ST. PAUL RY. CO., Defendants.

The plaintiffs by their attorneys, Messrs. Boyle, Warburton, Quick & Brockway, here present and consenting thereto;

It is ordered that the defendants city of Tacoma and Chicago, Milwaukee & St. Paul Railway Company, have leave to withdraw their separate answers to the plaintiffs' amended complaint herein, and to file separate demurrers to said amended complaint.

W. O. CHAPMAN, *Judge.*

Entered in Journal No. 118, at page 470, Dep't No. 3 on Mar. 23, 1909.

Filed in open court, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Sweet, Dep.

19 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendants.

Demurrer.

Now comes the defendant City of Tacoma, and demurs to the amended complaint of the plaintiff herein, on the ground that the same does not state facts sufficient to constitute a cause of action against this defendant.

T. L. STILES, *City Attorney.*
FRANK R. BAKER,
FRANK A. LATCHAM,
Ass't City Attorneys.

Service of within demurrer by copy, admitted this 24" day of March, 1909.

BOYLE, WARBURTON & B.,
Att'y- for Pl't'ffs.

Filed in open court Dep't No. 3, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

20 In the Superior Court, Pierce County, Wash.

No. 27364.

EDWIN HOWARD et al.
vs.
CITY OF TACOMA et al., Def'ts.

Comes now the Chicago, Milwaukee & St. Paul Railway Company, one of the defendants and demur- to the amended complaint on the ground that the said amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

H. S. GRIGGS,
GEO. W. KORTE,
Attorneys for said Defendant.

Waiver of copy and service admitted this March 23, '09.

BOYLE, WARBURTON & BROCKWAY, *Att'ys for Pl't'ff-.*

Filed in open court Dep't No. 3, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

21 In the Superior Court, Pierce County, Washington.

No. 27364.

EDWIN HOWARD et al., Plaintiffs,
vs.
CITY OF TACOMA et al., Defendant-.

The above entitled cause coming on to be heard upon the separate demurrers of the defendants to the amended complaint of the plaintiff- herein, Present, Messrs. Warburton and Brockway, attorneys for plaintiffs and Messrs. Korte and Griggs, attorneys for the defendant, Chicago, Milwaukee & St. Paul Railway Company, and T. L. Stiles, Esq., City Att'y, for defendant City of Tacoma.

And the court being fully advised in the premises; Ordered that said demurrers and each of them be sustained; plaintiffs except and are allowed ten days to amend.

W. O. CHAPMAN, *Judge.*

Entered in Journal No. 118, at page 470, Dep't No. 3, on March 23, 1909.

Filed in open court, Dep't No. 3, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

22 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation; CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Judgment.

The above entitled matter having heretofore come regularly on for hearing on the demurrer of the defendants, to plaintiffs' amended complaint, the said demurrer having been sustained and an exception allowed the plaintiffs, and the plaintiffs having elected to stand on their said amended complaint,

It is hereby ordered, adjudged and decreed, that said action be and the same is hereby dismissed and that the defendants herein have judgment against the said plaintiffs for their statutory costs in said action, and that an exception be allowed the plaintiffs.

Dated this 11th day of June, 1909.

W. O. CHAPMAN, *Judge.*

Entered Ex. Doc. No. 24, page 30.
Entered Jour. 118, Dep't 3, page 583, Jun- 11, 1909.
Filed in Superior Court, Jun- 11, 1909. J. F. Libby, Clerk. By McK. Deputy.

23 No. 27364.

EDWIN HOWARD et ux.
vs.
CITY OF TACOMA.

Judgment Debtor-, Edwin Howard and Emma Howard.
Judgment creditor-, City of Tacoma, a corp., & Chicago, Milwaukee & St. Paul Ry. Co., a corp.
Judgment Costs with interest at 6 per cent. per annum from date and costs. Dr. Cr.
22.

Defendants' costs—clerk's fee, $7.00.
Attorney's fee, $15.00.
Judgment entered Dep't 3, Journal 118, page 583, June 11, 1909.

T. L. STILES ET AL.,
Attorney- for Judgment Creditor-.

24 **In the Superior Court of the State of Washington in and for Pierce County.**

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,

vs.

CITY OF TACOMA, a Municipal Corporation, and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Notice of Appeal.

To the above named City of Tacoma, a municipal corporation, and its attorneys, T. L. Stiles, Frank R. Baker, and Frank Latcham, and to the above named defendant, the Chicago, Milwaukee & St. Paul Railway Company, and its attorneys, H. S. Griggs and Geo. W. Korte:

You and each of you will please take notice, that the above named plaintiffs Edwin Howard and Emma Howard his wife, appeal to the supreme court of the state of Washington, from that certain judgment of the superior court of the state of Washington, in and for Pierce county, in favor of the above named defendants and against the above named plaintiffs entered in the above entitled cause on or about the 11th day of June, 1909, said judgment being a judgment of dismissal and for costs.

BOYLE, WARBURTON & BROCKWAY, *Attorneys for Plaintiffs.*

25 Ent. J. 120, page 521, June 21, 1909.
Entered Ex. Doc. No. 23, page 30.

Service of the within admitted this 17 day of June, 1909.

H. S. GRIGGS,
Att'ys for C., Mil. & St. P. Ry., etc.
T. L. STILES,
City Att'y, for City of Tacoma.

Filed in Superior Court June 21, 1909. J. F. Libby, Clerk. By McK., Deputy.

26 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,

vs.

THE CITY OF TACOMA, a Municipal Corporation; CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Appeal Bond.

Know all men by these presents, that we Edwin Howard and Emma Howard, his wife, as principals, and the United Surety Company, a corporation, authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto the above named defendants, the Chicago, Milwaukee & St. Paul Railway Company, a corporation, and the city of Tacoma, a municipal corporation, and each of them in the full sum of four hundred dollars ($400.00) lawful money of the United States of America, to be paid to the said city of Tacoma, and the Chicago, Milwaukee & St. Paul Railway Company, for which payment well and truly to be made, we bind ourselves and each of us, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 21 day of June, 1909.

The condition of this obligation is such, that whereas in
27 an action pending in the superior court of the state of Washington, in and for Pierce county, entitled Edwin Howard and Emma Howard, his wife, plaintiffs, vs. The City of Tacoma, a municipal corporation, and Chicago, Milwaukee & St. Paul Railway Company, defendants, and being No. 27364, the above named Chicago, Milwaukee & St. Paul Railway Company and the city of Tacoma, secured against the said Edwin Howard and Emma Howard, his wife, a judgment of dismissal and for costs of the action, and

Whereas, the above named Edwin Howard and Emma Howard his wife, have given notice of appeal from said judgment to the supreme court of the state of Washington, and are appealing from said judgment.

Now, therefore, if the above named Edwin Howard and Emma Howard, his wife, will pay all costs and damages that may be awarded against them or either of them on the appeal or on the dismissal thereof and shall satisfy and perform such judgment appealed from in case it shall be affirmed, and shall satisfy and perform any judgment or order which the supreme court of the state of Washington, may render or make or order to be rendered or made by the superior court, then this obligation shall be void, otherwise to remain in full force and effect.

ED. HOWARD.
EMMA HOWARD.
[CORPORATE SEAL.] UNITED SURETY COMPANY,
By J. H. DAVIS.
JOHN E. HEASTY,
Its Attorney in Fact.

Ent. Bonds "K", pages 48-9 June 21, 1909.
Entered Ex. Doc. No. 24, page 30.
Filed in Superior Court, Jun- 21, 1909. J. F. Libby, Clerk, By McK., Deputy.

28 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Order.

The above entitled matter coming on for hearing on the application of plaintiffs for an extension of time in which to file their brief, the court being fully advised in the premises, and finding that a good cause has been shown for such extension,

It is hereby ordered, that said plaintiffs be allowed seven days from this day in which to serve and file their brief on appeal.

Dated this 15th day of September, 1909.

W. O. CHAPMAN, *Judge.*

Entered Jour. 124, Dep't 3, page 60, Sep. 15, 1909.
Filed in open court, Dep't No. 3, Sept. 15, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

29 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiff-,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Certificate.

STATE OF WASHINGTON,
County of Pierce, ss:

I, J. F. Libby, county clerk and by virtue of the laws of the state of Washington ex-officio clerk of the superior court of the state of Washington, for Pierce county, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellants to transmit to the supreme court.

In witness whereof, I have hereunto set my hand and seal of the said superior court at my office in the city of Tacoma, this — day of —— A. D. 1909.

J. F. LIBBY, *Clerk*,
By —— ——,
Deputy Clerk.

Indorsed: Filed in Superior Court Sep. 27, 1909. J. F. Libby, Clerk, By R. E. McF., Deputy.

30 No. 8381.

Department One.

Filed Jan. 21st, 1910.

EDWIN HOWARD and Wife, Appellants,
v.
CITY OF TACOMA and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondents.

Per Curiam:

This case, except that a different piece of land is involved, is almost identical in its facts with, and is governed by the rule announced by Ettor v. City of Tacoma, just decided. Upon the authority of that case, the judgment of the lower court is affirmed.

31 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs and Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, Milwaukee and St. Paul Railway Company of Washington, a Corporation, Defendants and Respondents.

Petition for Rehearing.

Come now the appellants Edwin Howard and Emma Howard, by their attorneys, Boyle, Warburton and Brockway and move the court for an order, granting a re-hearing in this cause for the reasons and upon the grounds as follows:

1. The case is controlled by decisions of the United States Supreme Court, not before presented to this Court.

2. Respondents are liable for the damage even though there had never been a statute giving compensation for damages resulting from an original grade. This necessary point we do not find decided in the opinion filed.

3. Chapter [illegible] of Laws of 1909, relied on by respondents is void even if it could be given a retroactive effect. This necessary point we do not find decided in the opinion filed.

Argument.

We believe if the court will read the cases referred to under our first head, it will feel bound in law to grant a rehearing. The second and third grounds involve points necessary to a decision in favor of respondents, and are not touched on in the court's opinion.

In making these statements counsel have due regard for the weight of a decision rendered after argument, and also for the statement of the court that the point decided dispensed with the necessity of further discussion. The fault is ours in not finding all the cases at the time of the original hearing and in not making our
[illegible] contention plain as to the second and third points.

Briefly reviewing the facts that the court understand our argument:

In the summer of 1906 the Elmes owned certain lots fronting on 29th street in what is now the Indian Addition to Tacoma, but was then under the sole jurisdiction of the county.

The Howards owned lots fronting on 29th street in what was then and is now the Tacoma Land Company's 7th addition to the city of Tacoma. Said 29th street separated the 7th addition from the Indian addition. The board of county commissioners at that time passed a resolution [illegible]

[illegible]

The Elmes and the Howards [illegible]

[illegible]

[illegible]

sent of laws — 1907, chapter 158, section 48, is a violation of the Federal Constitution, at least as applied to past transactions.

We must acknowledge ourselves remiss in not finding and presenting to the court for its aid, in our original briefs, all the law bearing on this case. We endeavored to make a thorough search, but owing perhaps to a blot in our mind, which did not agree with that of the decisions, we failed to find the following determinative cases, construing and applying the Federal Constitution to an almost identical case. The cases referred to are:

Muhlker v. New York & Harlem R. R. Co. 197 U. S. 544, 49 Law Ed. 879.

Stoneship Co. v. Inhabs. 2 Wall. 450.

Also Sauer v. City of New York, 206 U. S. 536, 51 Law Ed. 1170, where the doctrine of the Muhlker case is approved, but the case distinguished on the facts.

Considering first the facts to show that United States cases and this case are parallel.

As shown by the record and our briefs, the act of Congress authorizing the platting and sale of Indian addition, was subsequent in time to the original passage of the section as enacted in laws 1907, chapter 158, section 48. The United States government platted the addition. Therefore, these plaintiffs must have bought while the section was in force.

Turning now to the United States cases. In 1883 and 1887, the supreme court of New York held that the light and air coming from a street, could not be taken from the adjacent property owner, by the construction of an elevated railroad, without compensation being made therefor. Subsequently, one Muhlker acquired certain property fronting on a street. Thereafter, in compliance with a directory statute of New York, an elevated railroad was built in front of the property. In an action by Muhlker to recover for the

24 *damage resulting from the obstruction of light and air, resulting, the supreme court of New York attempted to distinguish the earlier cases and held that he was not entitled to recover. Muhlker appealed to the supreme court of the United States, invoking the 14th amendment, and also the "contract" clause of that instrument. The supreme court held that the distinction made by the New York court was not sound, and that the refusal to Muhlker of his right to compensation, was in effect a reversal of the doctrine of the earlier cases and that this could not be done particularly where not only had the property been purchased, but the damage accrued before the reversal. The case is even stronger than ours, since the change in that case was only a change in judicial decisions. They are parallel.*

1. In the Muhlker case, the city obtained the street by a deed "in trust nevertheless, that the same be appropriated and kept open as parts of public streets forever, in like manner as the

1. In our case the city obtained the streets by a dedication of the same as a street, operating "to all intents and purposes as a quit-claim deed for the purposes intended by the donor." Fail-

other public streets and avenues are and of right ought to be."

2. The property claimed to be injured was acquired while it was the law of the state that compensation must be made for consequential damages by the construction of an elevated railway in the street.

3. While this was still the law the property suffered consequential damage by the construction of an elevated road in the street.

35 4. After the infliction of such damage the rule of law was changed.

linger's Code, Sec. 1276, Pierce's Code, Sec. 3556.

2. The property claimed to be injured was acquired while it was the law of the state that compensation must be made for consequential damages by an original grade in the street.

3. While this was still the law, the property suffered consequential damage by the construction of an original grade in the street.

4. After the infliction of such damage the rule of law was changed.

The Supreme Court of the United States (after some discussion as to whether or not the easement to light and air was in itself property), bases its decision as follows, the words in brackets being ours:

However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases (this statute) were the law of New York, (Washington), and assured to him that his easements of light and air (right to compensation for an original grade) were secured by contract as expressed in those cases (such statute) and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

We are unable to see any possible distinction between this case and the Ettor case. Certainly a right growing out of a rule of law laid down by the courts of the state, and a subsequent damage falling within the rule is no more sacred, than a right growing out of
36 statute, and a subsequent damage falling within the statute. And certainly the Federal Constitution is as applicable to the legislature as to the courts.

This decision has never been reversed. In the Sauer case, 206 U. S. 536, 51 Law Ed. 1176, the court recognized the doctrine, and refused to apply it only because the law of New York at the time of the purchase was found to be the same as the declaration of law which it was claimed impaired the obligation of the contract. If, therefore, the judicial determination of the effect on consequential damages of a prior dedication or condemnation, becomes a part of a contract of purchase, effected after such judicial determination, surely a legislative declaration as to the rights of parties after a dedication, made prior to such dedication, will become a part of a contract of purchase affected subsequent to the dedication and legislative enactment. We respectfully submit that as to the Ettor case, this court is bound by this decision of the supreme court of the United States.

In the Howard case, the facts so far as appear by the record, may be slightly different, but not so different, we believe, as to change the rule of the Muhlker case. When the pleadings in the Howard case were originally drawn, it was not anticipated that the statutes would be changed or that the comparative date of its passage, and the acquirement of the property by plaintiff, would ever be drawn into the case. Consequently, we did not allege the date of purchase.

We think, however, that as against a demurrer, interposed almost the day of the passage of the only act which could be deemed to render such matter material, a court of justice, after the opportunity to amend is gone, may well assume that the property, situated in a city where every abstract shows a change of ownership within the last ten years, was in fact, purchased subsequent to 1893, the date of the original passage of the act giving compensation. If the Howard case should go off on this question of the alleged retroactive effect of chapter 80 of the laws of 1909, as determined by the date of the purchase, a sustaining of the judgment on the ground that the date of purchase is not alleged, would result in a miscarriage of justice on a technical point, a miscarriage easily avoided by taking
37 judicial notice, or assuming in support of the complaint that the purchase was made within the last sixteen years, and while the same law was in effect, that was in effect when the damage was done.

Be that as it may, we contend that the other supreme court case cited, is conclusive also of the Howard case. For while the opinion in the Muhlker case is not based on such ground, yet it has been in effect held, that the very grading of the street while a statute was in force, not only requiring compensation, but permitting it to be made after the doing of the damage, (Laws 1905, chapter 55, section 52; Laws 1907, chapter 153, section 53) creates a contract to pay for such damage. It is a universal principle that the law will presume an intention and agreement to perform that which the law declares ought to be performed.

If A enters upon the land of B and cuts down and removes his trees, the law will presume an agreement to pay their value, and B may waive the tort and sue in contract. Forms of pleading are in this state abolished, but the principle of the implied agreement still persists.

Thus in Steamship Co. v. Joleffe, 2 Wall. 450, Mr. Justice Field held that the repeal of a law authorizing a pilot to recover half pilotage from a vessel hailed, but which had rejected his services, did not and could not take away the right of action which had arisen before the repeal. It was the legal duty of the vessel to pay such half fees though the services were rejected, and the law will presume an agreement on its part to fulfil such duty. Such quasi contract the constitution will protect after the repeal of the statute. In our case, the law said, "on or after grading the street you must make compensation." The street was graded. Surely the law will presume a like intent and agreement to comply with its requirements.

So also it has been held by the Montana court that the right of action arising out of the cutting from public lands of trees less than eight inches in diameter, persists, though after the cutting, it was made lawful to cut such trees. The action might be considered as one in tort, or one in contract, but in any event, it vested by the doing of the act, and could not be taken away by the subsequent repeal of the statute. U. S. v. Williams, (Mont.) 19 Pac. 228.

38 Perhaps this doctrine is the true explanation of Graham v. C., M. & St. P. Ry. Co. (Wis.) 10 N. W. 609; Dash v. Van Cleeck (N. Y.) 5 Am. Dec. 291, and James v. Oakland Traction Co. (Cal. App.) 103 Pac. 1082, the first two of which were cited and discussed in our original briefs, and all of which hold that the repeal of a statute does not take away a right of action already accrued and which grew out of the statute. Certain it is that the United States Supreme Court will apply the doctrine if necessary to bring the case within the contract clause of the Federal constitution.

We conclude that the doctrine of the Joliffe case, 2 Wall. 450 controls both the Ettor case and the Howard case, and that the Muhlker case, 197 U. S. 544, 49 Law Ed. 872, controls the Ettor case, and by fair intendment of the facts, rules the Howard case also.

II.

An affirmance of the judgment involves a holding that a city, or those purporting to act under it, may, without liability to abutting property owners, entirely disregard the charter limitations on the power of the city in regard to street grading, without incurring liability to abutting owners for resulting damage.

This has nothing to do with laws 1907, chapter 153, section 48.

The charter provides that the city shall have power "by ordinance only" to grade streets, or establish grades, that the city council "shall by ordinance establish the grade of all streets," that there shall be a report to the council by the commissioner of public works; that there shall be a petition by the property owners, or a two-thirds vote of the council; that there shall be a notice of the improvement with a right to remonstrate. Charter of City of Tacoma, Section 52, subsec. 7, 185; 204; 205; 135.

Appellants' counsel endeavored in their briefs to show that each defendant in the creation of the physical grade and cut herein question, knowingly and wilfully violated every provision of the charter of the city of Tacoma, touching street grades; that such violation de-

39 deprived them of their protection, as a municipal corporation or its agent and rendered them liable for the damages accruing to appellants from their acts, and that such liability was entirely independent of the statutes, and principles referred to in the court's opinion. (Assignment of Error No. 3 in Ettor case; Argument in Ettor opening brief pp. 67-79, inclusive, Ettor reply brief pp. 32-36 inclusive; Howard opening brief pp. 47-59 inclusive; Howard reply brief pp. 20-24 inclusive.) As to the fact of the violation of the city charter, there is no dispute. It is conceded that the grade was established and the work done on the "ipse dixit" of the city engineer, the mayor and certain councilmen without any action by the council whatsoever. And this in the face of express charter requirements that such action may be taken by ordinance "only."

As to the effect of such violation, there is however, a disagreement. Respondents in their briefs contend

1. That as to the Ettor property, the grading was authorized by the action of the board of county commissioners, before the property came into the city.

2. That inherity and by statute a city has power to grade its streets, and that therefore, the charter provisions expressly requiring that it shall be done by ordinance only, and after notice to the property owners, is so much waste paper.

Appellants on the other hand in their briefs contend:

1. That as to the Ettor case, the action of the board of county commissioners did not authorize any grading at all, and certainly did not authorize the particular grade built. This matter is fully taken up in the oral argument and briefs (Ettor opening brief p. 21-33 Ettor reply brief pp. 1-12.) The action of the board gave no rights in 26th street, and at most left the matter of establishing the grade on annexation to the successors of the board, that is to the city council. But the city council never acted. As to the Howard case, it is conceded that the board's action could not effect the street in front of his property, and that the legal effect of the unauthorized action of the city and railroad company, must be determined
40 as though the board had never attempted to interfere.

2. That the charter requirements are valid and mean just what their language imports, and constitute a limitation on the power of the city to grade its streets. This seems so axiomatic that we did not quote authorities in our brief and now content ourselves with quoting the language of this court: "The mode prescribed is the measure of authority."

3. That whenever a municipality, or any one purporting to act for a municipality or in the streets of a municipality undertakes to change the grade of a street contrary to such limitations, whether such grade be an original or a regrade, and in so acting, goes beyond or contrary to the express or implied limitations of the charter, it loses the protection which otherwise covers it as one exercising a governmental power in a lawful manner. We admit what this court said in its opinion and also in the Fletcher case; that by dedication, a property owner consents to the future grading of the

street, even to his damage in the absence of statute, provided, always, that such grading be in a lawful manner. But where the grading is unlawful or in excess of the city's powers, the person or city doing such grading, must answer for the resulting damages. This liability depends, not upon the reasonableness or unreasonableness of the grade per se, nor upon whether the city might or might not have reached the same result had it kept within the bounds of its power, but upon two facts which invariably result in liability:

1. An injury to another;
2. No lawful power to inflict such injury.

In support of this principle, we cited and analyzed a large number of authorities from many jurisdictions. (Ettor opening brief pp. 71-77; Howard opening brief, pp. 51-57.) We also distinguished the one case cited by respondents, in that in such case, as therein pointed out, the city was acting within the bounds of its power. (Ettor reply brief, bottom p. 33 and all of p. 34; Howard reply brief, bottom p. 21 and all p. 22.) We do not care to here
41 renew or reiterate such discussion of authorities. But we do wish to urge that the gist of such decisions is logically and necessarily true.

1. The city in grading the street without following charter limitations proceeded beyond its power.
2. The city in grading the street, injured a property owner.
3. The city and those acting with or under it, is liable.

Now, it is evident that

1. This question has nothing to do with the acts of 1907 or 1909, and was not passed upon in the opinion filed.
2. An affirmance of the judgment constitutes

a. A disregard and refusal to follow the principles and authorities above set forth.

b. An affirmance of the right of any petty city officer or person or corporation, purporting to act under him (the defendant railroad company in this instance) to utterly ruin any property owner, by grading and cutting, leaving the property owner without redress unless he can accomplish the impossible and show what a legislative body, the council, would have done had the matter been properly and legally presented to them.

We do not believe that it was the intention of this court to sanction any such rule, and therefore, request a rehearing that an opininon may be rendered upon the question involved.

III.

Laws 1909, chapter 80, being the so-called repealing statute is unconstitutional, aside from its retroactive effect, and cannot, therefore affect the laws 1905, chapter 55, section 47, laws 1907, chapter 153, section 48, on which we partly rely.

We endeavored to raise and present this point by assignment — error No. 4 in the Ettor case, and by argument (Ettor opening brief, pp. 43 to 48, Howard opening brief, pp. 23 to 28.) It is necessary to decision of the case and does not depend on the unconstitutionality of the act as opposed to the constitutional provisions dealing

with retroactive laws. It is not passed on by the court in
42 the opinion filed, which assumes the validity of the so called repealing act unless invalid on the ground of being retroactive. We conclude that we did not make our argument plain. Endeavoring to rectify such mistake and proceeding by syllogisms.

Syllogism I.

1. Our constitution is plain on this point. Before property can be "damaged," compensation must be made.

2. It is equally plain under the decision of the court that damage resulting from a regrade of street, after improvements thereon is "damage" within the meaning of the constitutional prohibition.
Brown v. Seattle, 5 Wash. 35 on p. 40.

3. Therefore, any statute which attempts to authorize such damage by regrade, before compensation, is unconstitutional.

Syllogism II.

1. Act 1909, chapter 80, by its language does two things only. It authorizes a city in case of a change of grade to

a. Pay for damages resulting therefrom under the eminent domain proceeding elsewhere outlined in the act.

b. To pay for damages resulting from a change in grade by assessment to be raised as the other costs of the work, that is by money to be raised and paid after the damage has been done.

2. The first option given by the language of the section (that is to follow out the eminent domain proceedings in case of a regrade) is already covered by sections one and two of the act of which it is an amendment (Laws 1905, chapter 55, p. 84, Laws 1907, chapter 153, p. 316) which provides that the city may 'damage any property—for the purpose of making changes in the grade of any street—after just compensation having first been made—in the manner prescribed by this act."

3. Therefore the only effect of section 80 of the laws of 1909 was to attempt to authorize a city in case of damages resulting from a change of grade, to do the damage first, and pay for it afterwards.

Syllogism III. Combining I and II.

1. Any statute which attempts to authorize damages to
43 abutting property by a change of grade, before making compensation, is unconstitutional.

2. The only effect of chapter 80 of the laws of 1909, was to attempt to authorize a city to damage abutting property by a change of grade without first making compensation therefor.

3. Therefore, chapter 80 of the laws of 1909 is unconstitutional.

Syllogism IV. Applying Syllogism III.

1. "An amending act which is unconstitutional and void, does not, being a nullity, in any way affect the validity of the act amended.

Especially is this true where the amendment is by implication, or the repealing clase is general, applying only to acts or parts of acts inconsistent with the amendatory statute."

Quotation from Am. & Eng. Enc. of Law, Vol. 26, p. 712.
In re Nolan 21 Wash. 395.

2. Chapter 80 of the laws of 1909, alleged to amend section 47 of chapter 55 of laws 1905, section 48 of chapter 153 of laws 1907, said sections so alleged to be amended, being the ones on which we partly rely, does not expressly repeal or amend such sections and is unconstitutional.

3. Therefore, section 47 of chapter 55 of laws 1905, section 48 of chapter 153 of laws of 1907 are not in any way affected by chapter 80 of the laws of 1909 on which defendants rely.

Conclusion.

We, therefore, respectfully ask a rehearing of both the Ettor case and the Howard case on the three grounds first set forth.

1. The case is controlled by decisions of the United States supreme court.

2. Respondents are liable for the damage even though there had never been a statute giving compensation for damages resulting from an original grade.

3. Chapter 80 of Laws 1909, relied on by respondents is
44 void even if it could be given a retroactive effect.

Respectfully submitted.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

Indorsed: Filed Feb. 16, 1910. C. S. Reinhart, Clerk.

45 Department One.

Filed March 26th, 1910.

No. 8381.

EDWIN HOWARD, Appellant,
v.
CITY OF TACOMA et al., Respondents.

On Petition for Rehearing.

Per Curiam:

The petition for rehearing in this case is denied on the authority of the decision this day filed in the case of Ettor v. City of Tacoma.

46 In the Supreme Court, State of Washington, Tuesday, March 29, 1910.

No. 8381.

EDWIN HOWARD and WIFE, Appellants,
vs.
CITY OF TACOMA and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondents.

Judgment.

The cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Pierce county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now on this 29th day of March, A. D. 1910, on motion of T. L. Stiles, Esquire, of counsel for respondents, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, petition for rehearing denied, and that the said City of Tacoma and the Chicago, Milwaukee & St. Paul Railway Co., have and recover of and from the said Edwin Howard and wife and from the United Surety Company, surety, the costs of this action taxed and allowed at Thirty-two & 15/100 dollars, and that execution issue therefor. And it is further *argued* that this cause be remitted to the said superior court for further proceedings in accordance herewith.

47 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and EMMA HOWARD, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Washington:

Your petitioners, the above named appellants considering themselves aggrieved by the final judgment and decision of the above entitled court in the above entitled cause, affirming the judgment of the superior court, dismissing appellants' action with costs and believing that said judgment decision is erroneous for the reasons specified in the attached assignment of errors filed herewith, *that* the said appellants and each of them now pray a writ of error to the

above entitled court from the supreme court of the United States and ask that the amount of the supersedeas bond be fixed.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

EARLE B. BROCKWAY.

48 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and EMMA HOWARD, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Assignment of Errors and Prayer for Reversal.

Now come the above named appellants and each of them and file herewith their petition for a writ of error and say that there are errors in the record, proceedings and judgment in the above entitled cause and in the denial of appellants' petition for re-hearing of said cause, and for the purpose of having the same reversed in the United States supreme court, make the following assignments of error:

1. The supreme court of the state of Washington erred in denying the claim set up by appellants that the right to receive compensation, accruing to appellants under and by virtue of the laws of 1907, chapter 153 and particularly sections 1, 2 and 48 thereof, said statute being a continuation of the laws of 1893, chapter 84, and said right to receive compensation being for injuries resulting to appellants' abutting and adjacent property by reason of the grading by respondents of East 26th street in the city of Tacoma, which adjoined their premises, was a vested and accrued right, falling within the protection and immunity granted by the 14th amendment of the constitution of the United States, and not therefore subject to be divested by the passage of the Laws of 1909, chapter 80, said statute being passed subsequent to the damage complained of and to the institution of an action against respondents to recover therefor.

49 2. The supreme court of the state of Washington erred in denying the claims specially set up by appellants under and by virtue of article 1, Section 10 of the constitution of the United States to full and complete immunity from the operation and effect of the laws of the state of Washington for 1909, chapter 80, as applied to the right of appellants to receive compensation for injuries resulting to their property by the establishment and construction by respondents of an original grade in 26th street, adjoining their premises, which right to compensation accrued to appellants by virtue of the laws of the state of Washington for 1907,

chapter 153, being a continuation of the laws of 1893, chapter 84, and in effect when appellants purchased their property and when the damage to such property accrued by the establishment of such grade. The court erred in that the ruling just referred to and the effect so given the laws of the state of Washington for 1909, chapter 80, gave such statute effect as a law impairing the obligation of contracts and that in so far as this is a proper construction of said law of 1909, it is opposed to said article 1, section 10 of the constitution of the United States.

3. The supreme court of the state of Washington erred in denying the claim specially set up by appellants under and by virtue of section 1, article 14 of the amendments to the constitution of the United States to have their case determined and their right to compensation adjudicated, without reference to the laws of the state of Washington, for 1909, chapter 80, which statute was passed subsequent to the accrual of appellants' right to compensation, growing out of damage to their property by grading by respondents of East 26th street in the city of Tacoma, Washington, and which statute was construed by the said supreme court to repeal laws of the state of Washington, 1907, chapter 153, section 48, being a continuation of the laws of 1893, chapter 84, and which was in force and effect when said damage accrued and which forbade
50 respondents to grade any street to the damage of abutting property owners, without making compensation therefor, and which said laws of 1909, chapter 80, *was* further construed by the supreme court of the state of Washington as intended and operative to defeat any right to compensation accrued at the time of its enactment under said laws of 1907 and 1893. By such ruling and decision, the supreme court of the state of Washington deprived these appellants of property, without due process of law and by such decision and ruling the supreme court of the state of Washington permitted and caused the appellants to be deprived of their property without due process of law by said chapter 80 of the laws of the state of Washington for 1909.

4. The supreme court of the state of Washington erred in holding that though the appellants might have enjoined the respondents from the grading of East 26th street in the city of Tacoma, to the damage of their abutting property, since there had never been the passage of any ordinance, authorizing said grading as by the charter of the city of Tacoma required, yet not having so enjoined said work, they could not recover damages from either of said respondents on the ground that said work of grading was not so authorized by ordinance.

5. The supreme court of the state of Washington erred in affirming the judgment of the lower court and in denying appellant- petition for a re-hearing.

6. The supreme court of the state of Washington erred in holding that appellants' right to compensation for injuries to their property by the grading by respondents of East 26th street in Tacoma, Washington, which street adjoined said property, which right to compensation arose out of laws of 1907, chapter 153, being a continuation of the laws of 1893, chapter 84, was not a vested right and for

that reason only, was not protected from the operation of the
51 laws of 1909, chapter 80, either under the 14th amendment of the constitution of the United States, or under article 1, section 3 of the constitution of the state of Washington.

7. The supreme court of the state of Washington erred in holding that appellants' property was not "taken or damaged" either by the grading by respondents of East Twenty-sixth street in the city of Tacoma, Washington, or by the deprivation of their accrued right to compensation therefor, which deprivation was affected through the laws of the state of Washington for 1909, chapter 80, and the construction thereof by the courts.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

EARLE B. BROCKWAY.

Prayer for Reversal.

For the above and foregoing errors, the appellants Edwin Howard and Emma Howard, his wife, pray that the said judgment of the supreme court of the state of Washington, entered March 29, 1910, and that said order of the supreme court of the state of Washington, denying appellants' petition for rehearing entered March 29, 1910, and the opinion on which was filed March 26, 1910, be reversed, and the judgment rendered in favor of appellants (the plaintiff-below) and for costs.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

Indorsed: No. 8381. Petition for Writ of Error. Filed Mar. 31, 1910. C. S. Reinhart, Clerk.

52 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and EMMA HOWARD, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Order Allowing Writ of Error.

Upon reading the petition of Edwin Howard and Emma Howard, his wife, appellants in the above entitled cause, for the allowance of a writ of error to remove said case to the Supreme Court of the United States;

It appearing to my satisfaction that on the 29th day of March, 1910, the final judgment was made and entered by the supreme court of the state of Washington, in the above cause, and that on

the 29 day of March, 1910, an order was made and entered, denying appellants' petition for a re-hearing of said cause; that the said court is the highest court of the state of Washington, in which a decision in said suit could be had; that in said cause, petitioners and appellants in said cause specially set up and claim a title, right privilege and immunity under the first section of the 14th amendment to the constitution of the United States and also under the tenth section of the first article of the constitution of the United States, and that the decision in said supreme court of the state of Washington is against the title, right, privilege and immunity so specially set up and claimed and that in said cause there was drawn in question the validity of chapter 80 of the laws of the state of Washington for 1909, on the ground that said statute is repugnant to the first section of the 14th amendment to the constitution of the United States and also repugnant to the tenth section of the
53 first article to the constitution of the United States and the decision of the supreme court of the state of Washington was in favor of the validity of said statute of the state of Washington;

It is ordered, that the writ of error to remove said cause to the supreme court of the United States issue and that in said writ, Edwin Howard and Emma Howard, shall be named as plaintiffs in error and the city of Tacoma, a municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, shall be named as defendants in error. Said writ shall issue upon plaintiffs in error filing bond in the sum of five hundred dollars ($500.00) conditioned, that they will prosecute their writ to effect and if they fail to make their plea good, shall answer costs and damages. Said bond when approved and said writ, shall operate as a supersedeas.

Dated at Olympia, Washington, this 31 day of March, 1910.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: No. 8381. Order allowing Writ of Error. Filed Mar. 31, 1910. C. S. Reinhart, Clerk.

54 In the Supreme Court of the United States.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs in Error,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants in Error.

Bond.

Know all men by these presents, that we, Edwin Howard and Emma Howard, as principals, and National Surety Company, a corporation, organized and existing under and by virtue of the laws of the state of New York, and duly qualified and authorized to transact the business of a surety company in the state of Washing-

ton, as surety, are held and firmly bound unto the said city of Tacoma, a municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, in the sum of five hundred dollars ($500.00) to be paid to the said city of Tacoma, a municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, their executors administrators and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 31st day of March, 1910.

Whereas lately at a session of the supreme court of the state of Washington, in a suit pending in said court, between the above named plaintiffs in error and the above named defendants in error, final judgment was rendered against the said plaintiffs in error and the said above named plaintiffs in error, having obtained a writ of error from the supreme court of the United States and filed a copy thereof with the clerk of said court to reverse said judgment;

55 Now, therefore, the condition of this obligation is such that if the said Edwin Howard and Emma Howard, shall prosecute their said writ of error to effect, and if they shall fail to make their plea good, shall answer all damages and costs that may be adjudged, then this obligation be void, otherwise, to remain in full force and effect.

EDWIN HOWARD.
EMMA HOWARD.
By BOYLE, WARBURTON & BROCKWAY,
EARLE BROCKWAY,
Their Attorneys.

[Seal of National Surety Co.]

NATIONAL SURETY COMPANY.
By CHARLES O. BATES,
Resident Vice President.
By W. H. OPIE, *Resident Assistant Sec'y.*

Bond approved and to operate as supersedeas.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: 8381. Bond. Filed Mar. 31, 1910. C. S. Reinhart, Clerk.

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the

State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Edwin Howard and Emma Howard, his wife, and City of Tacoma, a Municipal Corporation and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, wherein was drawn in question the validity of *the* treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Edwin Howard and Emma Howard, his wife, as by their complaint appears; We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
57 the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty (60) days, from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller — Justice of the United States, the 1st day of April, in the year of our Lord one thousand nine hundred and ten.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, Western District of Washington,
By SAM'L D. BRIDGES,
Deputy Clerk.

Allowed to operate as a supresedeas, by—

____ ____,
Chief Justice of the Supreme Court of the State of Washington.

58 [Endorsed:] 8381. Filed Apr. 2, 1910. C. S. Reinhart, Clerk.

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to City of Tacoma, a Municipal Corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Washington, wherein Edwin Howard and Emma Howard, are plaintiffs in error and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Rudkin, Chief Justice of the Supreme Court of the State of Washington, this 14 day of April, A. D. 1910.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

60 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation on the therein-named City of Tacoma a Municipal Corporation by handing to and leaving a true and correct copy thereof with T. L. Stiles as Attorney of record for defendant in error City of Tacoma personally at Tacoma in said District on the 14th day of April, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal,
By I. S. DAVISSON, *Deputy.*

Marshal's fees $2.06.

61 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation on the therein-named Chicago, Milwaukee and St. Paul Railway Company by handing to and leaving a true and correct copy thereof with Herbert S. Griggs as Attorney of record for defendant in Error Chicago, Milwaukee & St. Paul Railway Company personally at Tacoma in said District on the 14th day of April, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal,
By I. S. DAVISSON, *Deputy.*

Marshal's fees $2.06.

62 [Endorsed:] 8381. Filed Apr. 27, 1910. C. S. Reinhart, Clerk. U. S. Marshal's Civil Docket No. 3342.

63 In the Supreme Court of the State of Washington.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs and Appellants,

vs.

CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants and Respondents.

Certificate.

I, Frank H. Rudkin, Chief Justice of the Supreme Court of the state of Washington, do hereby certify that this suit was brought by the appellants Edwin Howard and wife, to recover for damages claimed to have been caused to their property situated on East 26th street in the city of Tacoma, a city of the first class, by an original street grade of said 26th street by the defendant, the Chicago, Milwaukee & St. Paul Railway Company, alleged to have been acting in connection with and under purported authority of the other defendant, the city of Tacoma; that at the time said grading was done, there was in force and effect in the state of Washington, Section 48, Chapter 153 of the Laws of 1907, which section was a re-enactment of identical sections in prior laws which had been in effect since 1893; that this section had been interpreted by this supreme court as giving a right of compensation to property owners, whose property had been injured by the original grading of a street, by or under the authority of a city of the first class, and did give such right. Appellants as one of the grounds of recovery, relied on said section and the said interpretation thereof by this court. After the commencement of the action and prior to the rendition of the judgment, the legislature of the state of Washing-

ton enacted Chapter 80 of the Laws of 1909. Defendants Chicago, Milwaukee & St. Paul Railway Company, and the city of Tacoma each contended in this court, that the right to compensation given by section 48, chapter 153 of the Laws of 1907 and prior identical laws, was taken away and destroyed by Chapter 80 of the
64 Laws of 1909 not only as to subsequent damages, but as to damages which had accrued at the time of the enactment of said Chapter 80, and for which suit had been commenced at the time of the enactment of said Chapter 80.

Plaintiffs being appellants in this court, contended in this court, that their right to compensation was a vested and accrued right at the time of the enactment of Chapter 80 of the Laws of 1909, and that to give such statute a construction which would deprive them of such right to compensation, would be in effect a deprivation of property without due process of law and in violation of the 14th amendment to the constitution of the United States.

Plaintiffs being appellants in this court further contended in this court, that the record showed that they had purchased the property while Chapter 153 of the Laws of 1907 or prior identical laws were in force and effect; that their right to recover compensation for injuries by an original grade under such statute was in effect, a contractual right of which the legislature could not deprive them and that any attempt by the state legislature or the court to deprive them of such right after they had purchased, was in violation of Article 1, Section 10 of the Constitution of the United States, forbidding any state to by law impair the obligation of a contract.

This court refused to sustain either of the contentions of plaintiffs, appellants in this court, and held that the right to compensation granted by Section 48, chapter 153 of the laws of 1907, was not a vested right, but was subject to legislative change after the damage complained of and before judgment. This court further held that Article 1 of section 10 of the Federal constitution did not govern a right to compensation for injury to property by an original street grade, when such right to compensation arose solely out of a statute in effect at the time the property was purchased. The determination of the case by this court in favor of respondents and against the plaintiffs and appellants, is based upon the two holdings above set forth.

Dated this 5th day of May, A. D. 1910.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court
of the State of Washington.

Indorsed: 8381. Filed May 5, 1910. C. S. Reinhart, Clerk.

65 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and WIFE, Appellants,
v.
CITY OF TACOMA et al., Respondents.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause. And, in pursuance of the Writ of Error heretofore filed in this cause, I now transmit the same, together with the original Writ of Error and the original Citation, to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Olympia, this 12th day of May, 1910.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: File No. 22,212. Washington Supreme Court. Term No. 69. Edwin Howard and Emma Howard, his wife, plaintiffs in error, vs. City of Tacoma and Chicago, Milwaukee & St. Paul Railway Company. Filed June 2d, 1910. File No. 22,212.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 69

EDWIN HOWARD, EMMA HOWARD, PLAINTIFFS IN ERROR,

vs.

CITY OF TACOMA, A MUNICIPAL CORPORATION, AND THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF PLAINTIFFS IN ERROR.

S. WARBURTON,
JOHN M. BOYLE,
E. B. BROCKWAY,
C. M. BOYLE,
Attorneys for Plaintiffs in Error.

(No. 22,212.)

SUBJECT INDEX.

LIST OF CASES REFERRED TO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 69.

EDWIN HOWARD, EMMA HOWARD, PLAINTIFFS IN ERROR,

vs.

CITY OF TACOMA, A MUNICIPAL CORPORATION, AND THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF PLAINTIFFS IN ERROR.

Statement.

In the year 1893 the State of Washington passed an eminent domain act, relating to cities of the first class, which provided in section 1 that "every city of the first class is hereby authorized and empowered to condemn land and property" for streets or for street improvements, "and to

damage any land or other property for any such purpose, or for the purpose of making changes in the grade of any street * * * and to condemn land and other property and to damage the same for any public use within the authority of such city after just compensation having been *first* made or paid into court for the owner in the manner prescribed by this act."

Section 2 provided, "When the corporate authorities of any such city shall desire to condemn land or other property, *or damage the same for any purpose authorized by this act*, such city shall provide therefor by ordinance," etc. Following this are detailed provisions for the exercise by the city of the right of eminent domain in such cases, for the payment of the damages by the city before doing the damage, and the raising of the money by special assessments to recompense the city for the payment of such awards. All of these provisions, however, down to section 47, contemplate the payment of the award before the taking or damaging of the property.

Section 47, concerning which and its alleged repeal this case centers, reads as follows:

> "If any street, avenue or alley, or the right to use and control the same for purposes of public travel, shall belong to any city, and such city shall establish a grade therefor, which grade requires any cut or fill, damaging abutting property, the damages to arise from the making of such grade may be ascertained in the manner provided in this act, but such city may provide that the compensation to be made for such damage, together with the accruing costs, shall be added to the cost of the labor and material necessary for the grading thereof, and shall be paid by assessment upon the property within the local assessment district defined by law or the charter or ordinances of such city in the same manner and to the same extent as other expenses of such improvement are assessed and collected. In such case it shall not be necessary to procure the appointment of commissioners or take the other proceedings herein provided for making such assessments, but all the proceedings

for the assessment and collection of such damages and costs shall, if so ordained by such city, be governed by the charter provisions, law or ordinances in force in such city for the assessment and collection of the cost of such improvements upon property locally benefited thereby: *Provided, however*, That this section shall apply only to the *original* grading of such street, avenue or alley."

It will be noticed that this section authorizes the city to damage abutting property by an *original* grade, but requires it to be accompanied by one of two acts:

First, the city may proceed by eminent domain, and pay the compensation before doing the damage; or,

Second, the city may include the damage in the general cost of the work, to be paid for as the rest of the work is paid for, in which event, under the laws as to street improvements and payment therefor by special assessment, the payment would not be made until the damage was done.

Laws of Wash., 1893, CLXXXIV, sections 1-47, pp. 189-207.

This statute, with amendments not material to this discussion, was continued as the law of the State through Ballinger's Code, sections 775-821; Laws of Wash., 1905, c. 55, sections 1-48, pp. 84-101, and Laws of Wash., 1907, c. 153, sections 1-48, pp. 316-336.

The following facts were alleged in the amended complaint, as further amended by stipulation, forming the basis of the action:

In October, 1906, the defendant, the Chicago, Milwaukee and St. Paul Railway Company, desiring for its own purposes a vacation of "M" and "N" streets, within certain property platted as Indian Addition to the city of Tacoma, but which was not yet annexed to or a part of said city, petitioned the Board of County Commissioners of Pierce county, who had jurisdiction of the streets therein, for an order vacating such streets.

On October 31, 1906, the board passed an order vacating said streets "subject to the following terms and conditions:"

> "1. That the said Chicago, Milwaukee & St. Paul Railway Co., its successors and assigns, shall, before this order of vacation becomes operative, at its, or their own expense, and without cost or charges to or upon the said county of Pierce, improve 26th street between East 'L' street and Bay street, in Indian Addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory roadway thirty feet in width along the center of said 26th street, between said limits, and by laying and constructing a good and sufficient plank sidewalk on one side of said South 26th street, *as directed by the said Board of County Commissioners of Pierce county, from said East 'L' street to East 'P' street, in said Indian Addition.*
>
> "The work and improvement shall be *done upon order of the said Board of County Commissioners, and according to plans prepared or approved by the said board* or the County Surveyor of said Pierce county, and to the satisfaction and approval of the said Board of County Commissioners of Pierce county, and shall in any event be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or take exclusive possession of said vacated portions of 'M' and 'N' streets, and shall be done within *ninety days after being notified by said board* to do said work and improve said street.
>
> "2. The said Chicago, Milwaukee & St. Paul Railway Company, its successors and assigns, shall pay all damages which the county of Pierce may become liable for resulting to any person, persons, firm or corporation, or property, by reason of such vacation, and the said railway company, its successors and assigns shall forever hold the said county of Pierce harmless from all such claims and damages.
>
> "3. Upon the failure of the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, to comply with all of the above terms and conditions, the said vacation shall become null and void and of no force and effect." (Plaintiff's amended complaint, Exhibit "B," Printed Record, pp. 8-9.)

Plaintiff's property, while fronting on 26th street, between East "L" and Bay streets, and so in terms covered by the order, was in said Indian Addition, or the jurisdiction of the County Commissioners, but was within the 7th Addition to the city of Tacoma, and at that time a part of the city. (Amended Complaint, paragraph VIII. Printed Record, p. 5.)

Nothing further was done by the railway company, the board or the County Engineer under the order of vacation until after August 19, 1907, on which date the Indian Addition was also taken into the city of Tacoma and became in all manner subject to the control of said city. (Amended Complaint, paragraph III. Printed Record, pp. 2-3.)

During the month of May, 1908, the defendant, Chicago, Milwaukee & St. Paul Railway Company, commenced to change the surface of 26th street in front of plaintiffs' property and notified the city of Tacoma through its Commissioner of Public Works and City Engineer of its intent to grade said street and change the surface thereof. Thereupon the Commissioner of Public Works of the city and City Engineer and members of the City Council inspected the proposed work and made and directed changes in the proposed plan for constructing the roadway and the street, increasing the fills and cuts proposed to be constructed by the railway company, and directed that the work be done under the direction of the Commissioner of Public Works and the City Engineer. Thereupon in pursuance of such verbal order and direction of the City Engineer, and with the knowledge and consent of the City Council of the city of Tacoma, and the Mayor of said city, the defendant railway company changed the former surface of the ground on 26th street in front of plaintiffs' property. (Amended Complaint, paragraphs III, IV and V. Printed Record, pp. 2, 3, 4.) No ordinance was ever passed by the City Council of the city of Tacoma establishing a grade in front of plaintiffs' property and said street was not improved and said roadway was not constructed in conformity with any grade established on said

street by ordinance of the city or City Council, and the city did not authorize the said grading by any resolution of the council, but all the work and improvement was done by the company under the wrongful oral direction of the Commissioner, City Engineer and City Council, under a pretense of complying with the provisions of the old order of the Board of County Commissioners, which never did have any authority over plaintiffs' property or the street in front of it. (Amended Complaint, paragraph VI. Printed Record, p. 4.) After the completion of this work the city adopted it by vacating "M" and "N" streets, as called for by the order of the Board of County Commissioners and by permitting the railway company to use said "M" and "N" streets and by using said 26th street as improved and as a roadway. (Amended Complaint, paragraph VII. Record, pp. 4, 5.) The grading done in front of the plaintiffs' property damaged plaintiffs' property in a large sum. (Amended Complaint, paragraph VII. Printed Record, p. 4.)

The city charter of Tacoma, of which the courts take judicial notice, contained numerous provisions requiring grades to be established by ordinance only (charter of city of Tacoma, section 52, subsection 7; also section 185, prohibiting the vacation of streets except by petition of the property owners), or except for public purposes (charter, sections 204, 205). Other sections gave the property owners a right to be heard by the City Council before the establishment of any grade or the doing of any grading (charter, section 135). The complaint shows that no attention was paid to any of these requirements; no formal action of any kind was taken by the council. On the contrary, the railway company, without any attempt to comply with the charter, went upon the street and made the grade and fill as called for by the plans of the City Engineer, to the great damage of the plaintiffs' abutting property. The amended complaint does not show whether the 7th Addition, in which the plaintiffs' property was situated, was platted or became a part of the

city prior to 1893, the date of the original passage of the statute. Nor does it show the date of plaintiffs' purchase of the property, further than that he owned it at all times during the acts alleged in the complaint.

In 1905, and prior to any of the matters herein alleged, the Supreme Court of the State of Washington construed the State Constitution relating to the damaging of property for public use, and the statute above set forth, as applied to the damage of abutting property by the establishment and construction of an original street grade.

Fletcher *vs.* City of Seattle, 43 Wash., 627, decided September 29, 1905. A fuller discussion of this case will be found in the argument; but, briefly stated, the doctrine laid down was as follows:

First. That the *constitutional provision* prohibiting the damaging of property for a public use, without first making compensation, does *not* apply to the damages accruing to abutting property by the establishment and construction of an original grade.

Second. That the *statute* above set forth does require a city establishing an original street grade which damages abutting property to provide compensation therefor, as set forth in section 48 of the act of 1907, and that a failure so to do justifies an action against the city to recover the damages suffered.

With the law and the facts in this condition, plaintiff in error commenced his action in the Superior Court against both the city and the railway company, to recover his damages suffered. While a similar action (Ettor *vs.* City of Tacoma, now pending before this court) was pending, and before its final determination, the legislature of the State of Washington passed the act of 1909 (Laws of 1909, ch. 80), effective immediately on passage, by which section 48 of chapter 153 of the Laws of 1907 was amended in the proviso thereof by the insertion of the word *"not"* instead of "only," so as to read:

"Provided, however, that *this section* shall *not* apply to the original grading of such street." No other provision of the act was amended. The act as amended provided that the city might "damage land for any * * * public use within the authority of the city, after just compensation having been made," etc.; that when the city desired to damage property for any purpose authorized by the act, it should proceed in a certain manner, that when the city desired to damage property by the establishment of a grade it might pay the compensation in another manner, "provided, however," that this last procedure shall *not apply* to the *original* grading of such street.

Defendant in error immediately called the attention of the trial court to this change in the law, withdrew its answer, and interposed a demurrer to the amended complaint, and the court held that the effect of the amendment was to deprive plaintiff of any right to recover for the damage suffered by the grading so completed without any pretense of first making or providing for the compensation required by the law in force when the grading was done and the damage suffered. Accordingly a judgment of dismissal was entered, from which plaintiff appealed to the Supreme Court of the State. On the original trial and on the appeal, plaintiff in error contended that to give the amendment of 1909 such an effect as to defeat plaintiffs' right of recovery for the damage resulting from the construction of the grade, without making the compensation required by the law in effect at the time the work was actually ordered and done and the damages suffered, was in direct violation of the Fourteenth Amendment to the Constitution of the United States, forbidding any State to deprive a citizen of property without due process of law, and also of article I, section 10, of the Constitution of the United States, forbidding any State to pass a law violating the obligation of a contract. The State Supreme Court held that the effect of the amendment of 1909 was to do away with any right of recovery for the estab-

lishment of an original grade, growing out of the act of 1907, and previous years, in force when the grading was done and the damage accrued, and that such effect was not contrary to either clause of the Federal Constitution invoked by plaintiff in error. On the entry of the judgment of affirmance, based on these decisions, this writ was sued out to the Supreme Court of the United States.

Assignments of Error.

Plaintiffs in error set out the following assignments of error. The Supreme Court of the State of Washington erred—

1. In holding that the effect of the Laws of Washington, 1909, c. 80, as interpreted by said Supreme Court, so as to prevent a recovery for the damages inflicted on plaintiffs in error by defendants in error in the establishment and construction of the grade before the passage of such act and while the Laws of 1907, c. 153, were in full force and effect, was not to deprive plaintiffs in error of their property without due process of law, as forbidden by the Fourteenth Amendment to the Constitution of the United States.

2. In holding that no contractual obligation to recompense plaintiffs in error, within the protection of article 1, section 10, of the Federal Constitution, arose from the establishment and construction by defendant in error of the original grade abutting on the property of plaintiffs in error, to their damage, while Laws, 1907, c. 153, sections 1-48, inclusive, were in force, requiring the making or providing for compensation for such damages before the city should cause them, and that therefore no such obligation was violated by the retroactive effect given Laws, 1909, c. 80.

3. In affirming the judgment of the Superior Court dismissing the action as to the defendant, the City of Tacoma.

4. In affirming the judgment of the Superior Court dismissing the action as to the defendant, the Chicago, Milwaukee & St. Paul Railway Company.

ARGUMENT.

The above statement fairly presents four questions for determination by this court:

1. Did the right to compensation for the damages suffered by plaintiffs in error, accruing to them by virtue of the statute in force when the damage was done, constitute "property" within the meaning of the Fourteenth Amendment to the Federal Constitution?

2. If so, did the amendment of 1909, as interpreted by the State Supreme Court, deprive them of that property without due process of law?

3. Did the plaintiffs in error have any contractual right to compensation for damages resulting from the original grade, growing out of the completion of the original grade to plaintiffs' damage, under a statute authorizing such grading only on the making or providing for compensation?

In determining these questions we assume that this court will be governed by the rules heretofore adopted in such cases.

1. Whenever rights growing out of a State statute are alleged to be within the protection of the Federal Constitution, and to have been defeated by subsequent State action, the Supreme Court of the United States will determine for itself and independently of the ruling of the State court as to the nature of such rights conferred by the original statute, and as to whether or not such rights are in fact within the Federal Constitution.

Jefferson Branch Bank *vs.* Skelly, 66 U. S., 431; 17 Law Ed., 173.

Bridge Proprietors *vs.* Hoboken Land & Imp. Co., 68 U. S., 116; 17 Law Ed., 571.

Chicago, B. & Q. R. Co. *vs.* State of Nebraska *ex rel.* Omaha, 170 U. S., 57; 42 Law Ed., 948.

Douglas *vs.* Commonwealth of Kentucky, 168 U. S., 488; 42 Law Ed., 948.

In the particular case at bar, as more fully appears in the argument, the construction of the original statute which this court would be bound to make from the statute itself is also the one which the Washington Supreme Court had adopted at the time the injury complained of arose. This being true, the proper construction of the original statute will admit of no doubt.

2. The Supreme Court of the United States will accept the holding of the State court as to what the legislature intended by the amendatory act of 1909. If the legislative intent so determined involved a deprivation of property without due process of law, or the violation of a contract, then the amendment is void, though this court might not originally have adopted such interpretation of the amendment.

Smiley *vs.* Kansas, 196 U. S., 447; 49 Law Ed., 547.

Gatewood *vs.* North Carolina, 203 U. S., 531; 51 Law Ed., 305.

Armour Packing Co. *vs.* Lacy, 200 U. S., 226; 50 Law Ed., 451.

Missouri, K. & T. R. Co. *vs.* McCann & Smizer, 174 U. S., 580; 43 Law Ed., 1093.

Passing then to a consideration under these principles of the Federal questions involved.

I. THE RIGHT TO COMPENSATION FOR THE DAMAGES SUFFERED BY PLAINTIFFS IN ERROR, ACCRUING TO THEM BY VIRTUE OF THE LAW OF 1907, AND PRIOR IDENTICAL STATUTES, WAS "PROPERTY" WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It is a very well settled rule of law that a city can act only in accordance with legislative authorization, and that if it is authorized to do a thing in a certain manner, or on certain conditions only, and does it otherwise, and damage results

from such action, it is liable for such damage. Particularly would this be true where authority to damage is coupled with an express requirement for compensation for such damage by a certain method. No further statute authorizing an action to recover for damages inflicted without complying with such requirement is needed. The right of action in such a case flows by force of the common law from the failure of the city to comply with the statutory requirement. The case before the court is such a case. Section 1 of the act reads:

> "Every city of the first class *is hereby authorized and empowered* to condemn land and property for streets * * * and for the opening of any street * * * and *to damage* any land or other property for such purpose, * * * and *to damage* the same *for any other public use* within the authority of such city after just compensation having been first made or paid into court for the owner *in the manner prescribed by this act.*"

Section 2 provides "that when the corporate authorities shall desire to * * * *damage the same* (property) *for any purpose authorized by this act,* such city *shall*" proceed by ordinance making provision for compensation.

Now it is perfectly plain that under this statute the city is authorized to "damage" property, as the term is used in the statute and sections, *only* on making compensation therefor. So far as the force and effect of the statute are concerned, it is immaterial whether the "damages" covered by the statute are the same "damages" referred to in the constitutional inhibition against damaging property without first making compensation therefor. If the statute stood absolutely alone, still it would prohibit a city from "damaging" property, as the term is there used, without making the compensation therein provided. If it damages property *without* making the compensation required by the statute, it is doing an unlawful act, because acting in a manner contrary to the statute, and must answer therefor, as any other wrongdoer.

The statute is *not* one specifically giving a *right of action;* it *is* one prescribing the only way and circumstances in which a city may lawfully damage property, and it is by force of the common law, that the right of action flows from an *unlawful* damage by a city inflicted without complying with such requirement.

The effect of the law is to declare unlawful any "damage" of property by a city unless the procedure therein outlined is followed, and the unlawful quality of the act is in no way mitigated though the "damage" therein referred to may not be further protected by the constitutional inhibition as to prior compensation for damages by the public authorities.

But if these sections stood alone it might be argued that the term "damage," as there used, was meant to be synonymous with the same term as used in the constitutional inhibition, and that therefore the act would *not* render unlawful a "damage" of abutting property by an original grade. Section 48 of the act, however, disposes of this argument, for by the terms of section 2 the act applies to *any* damage *for any purpose authorized by this act.* And section 48 very plainly authorizes damages for the purpose of an original grade. Indeed, it would seem that the legislature had in mind the doctrine that the State Constitution as to damaging for a public use does not apply to damages arising from an original grade, and intended to make it perfectly plain that the *statute did* include such damages; for as to all other damages the statute, in accordance with the Constitution, requires the compensation to be first made, while as to damage by an original grade only the city is authorized to make the compensation either before or after. The gist of the whole act is and can be nothing else than this:

The city may damage property "for any public purpose" and "for any purpose authorized by this act" on condition only of complying with the requirements of this act. The city may damage property by an original grade only on two conditions: either on complying with the requirements, as

in other cases of damage, or by making compensation afterwards in a particular manner. If section 48 were an enactment standing by itself it would still have this meaning, for authority to a city to do an act on certain conditions is equivalent to denying it authority to do it otherwise. But when it is considered in connection with section 2, which expressly demands that whenever the city shall desire to damage property for "any purpose authorized by the act" it shall do so by ordinance making provision for compensation, there is no room for construction left.

Whenever, therefore, the city damaged property by an original grade without complying with the act, and either making compensation before the grading or making provision for its payment thereafter, it did an unlawful act, for which it was answerable, not because the statute gave a right of action, but because the statute made the act unlawful. This is the only reasonable interpretation of the act, and it is the interpretation which the Washington Supreme Court had announced at the time the injuries complained of occurred. And while we understand it to be the duty of the Supreme Court of the United States to determine such question for itself, still added cogency is given to the argument when it is the interpretation given it by the Supreme Court of Washington.

The case of Fletcher *vs.* Seattle, 43 Wash., 627, decided in 1906, was first heard without reference to the statute now under consideration, and the court held that the State constitutional inhibition against damaging property for a public use without first making compensation did not apply to damages (as distinguished from actual entry or taking) by the establishment of an original grade. This on the theory that such damages were considered and compensated for or relinquished by the property owners at the time of the original plat.

The case coming on for rehearing the attention of the court was called to the statute now under consideration and the court said:

"It is contended by the learned counsel for the city that the right is not conferred by this section, that the statute should be strictly construed, and that it does not contemplate a cause of action for consequential damages; that it merely provides that where a street is graded in such manner as to damage abutting property, the city may provide that the compensation to be made for such damages should be assessed to the cost of the grading, and assessed against the abutting property in the manner provided by the charter provisions in force in said city for the assessment and collection of cost of such improvement on the property benefited thereby, and that *if a cause of action had been given for such class of damages* the grant would have been express and explicit; that the object of the statute is to enable the city to include damages for actual trespass upon private property in the construction of the improvement and that the damage referred to should be construed to be such damages as the property owner has the right of action for under other statutes or constitutional provisions, or by force of the common law. It does not seem to us that this position is tenable. We think the word 'damages' used in the section has the same significance and meaning that it has in *other sections of the same act, and that it was used in its broad sense and includes consequential damages.* We see no reason why this provision of the law should be segregated from the other provisions, and a different construction placed upon it, *or why the provisions of the act in relation to the assessment of the damages should not apply to it as it does to the other sections and if it does the right of compensation is equally granted.*"

In other words, the Washington Supreme Court holds that the provisions of sections 1 and 2 of the act, *expressly* requiring a city to make compensation as a necessary condition to the rightful damaging of the property, apply to the consequential damage of abutting property by an original grade referred to in section 48, and that this being true, it was not necessary that there be given any explicit right to recover by action where such steps were not taken. The right of action flowed from the violation of this statute.

Further on the court used the following language:

> "Section 2 says, when the corporation authorities of any such city shall desire to condemn land or other property or damage the same for any purpose authorized by this act such city *shall provide*, etc. In this case the city had the power to damage the respondents' land, and it was found that it did damage it and *it damaged it in a way that it was authorized by sec. 47 of this act;* namely, by establishing a grade on the street upon which their property abutted."

And the city having so damaged the property "as authorized by the act," but without following the conditions imposed by the act, was of course held liable for the injury in the action brought to recover for such illegal act.

A right of action for damages resulting from the construction of an original grade by a city which has not made or provided for compensation in the manner required by the act being, then, a right of action for an act made unlawful by the statute, we proceed to determine whether such a right is "property" within the meaning of the Fourteenth Amendment to the Federal Constitution.

And in the first place it may be laid down as a general rule that a vested right of action is property, and as much protected by the Fourteenth Amendment as land or money.

Numerous authorities to this general and unquestioned statement might be cited, but we content ourselves with two which no one will question.

> Cooley Const. Lim. (4th ed.), p. 449.
>
> Angle *vs.* Chicago, St. P., M. & O. R. Co., 151 U. S., 65; 38 Law Ed., 55.

The Angle case was one in which there was properly before this court the validity of what was alleged to be an attempt by the legislature to do away with the right of action arising out of a tort committed prior to the passage of the act, and the court used the following language:

"But it must be remembered that the wrongs of the Omaha company were done before the legislature passed either the act of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing these acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage company? Did the resumption of the land grant and the regrant to the Omaha company make lawful its acts in bribing the officers of the Portage company? Did it relieve the Omaha company from any liability for the wrongful use of the process of the courts in the injunction? Could it act judicially and in effect decree that the wrongs done by the one company to the other created no cause of action? *A right of action to recover damages for an injury is property;* and has a legislature the power to destroy such property? An executive may pardon, and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from liability to the individual he has wronged."

We are aware that there are numerous decisions of this court, prior to the adoption of the Fourteenth Amendment, holding that there is nothing in the Federal Constitution to prevent a State from passing a retroactive law, as to other than a criminal or contractual matter, and not, therefore, either *ex post facto* or within the inhibition against the violation of contracts. But these decisions, so far as we know, were before the adoption of the Fourteenth Amendment, and are not in conflict with the Angle case, *supra*, decided since the passage of such amendment, and which expressly holds that a cause of action for tort *is* property which a legislature cannot destroy.

Unless, therefore, there is something peculiar in a cause of action *arising out of a violation of a statute*, taking it out of this general rule, the cause of action presented by this case was property, and as such protected from legislative interference. It was at this point that the State Supreme Court,

in our opinion, fell into its first error. It held that the effect of the amendment of 1909 was to repeal section 48 of the act of 1907 and prior years; that if the rights given by the act of 1907 were substantive we were right in our contention, but that we were, in truth, merely asking for the enforcement of a cause of action, given only by statute, and that such cause of action fell with the repeal of the statute. We quote the argument of the court:

> *"The right in this case is statutory, and a pending action, at whatever stage, falls with the statute.* There is a marked difference between the creation of a new or cumulative remedy for an existing right and the creation of the right itself. That the repeal of a statute conferring jurisdiction *or creating a right of action,* without a saving clause, takes away all right to proceed, and that the repealed act will be considered as if it never existed, except for the purposes of those actions or suits which have been prosecuted and concluded while it was an existing law, has been so often stated in the books that it has become axiomatic. It is even held that a repeal after judgment, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to a higher court charged the appellate court with the duty of declaring the litigation ended without right of further prosecution." * * *
>
> "As will be seen by reference to these authorities, the rule is applied by the courts *in all cases* where the right depends on the remedy, for the rule is universal that there is no vested right in a particular remedy *unless the remedy is a part of the right itself.*"

The vice of this argument and holding is twofold:

First. Neither reason nor authority will support the argument in the broad form stated.

Second. As we have already shown, this is not a mere cause of action given by a statute, but a right of action arising from a violation of the statute from the doing of an unlawful act.

In discussing the question as to how far a right of action

given by a statute can be affected by a subsequent repeal of the statute, it may be admitted that there is authority for the holding that *penalties unrecovered* when the statute giving them is repealed fall with the statute. But these cases are based on the theory that a penalty is a peculiar form of obligation or punishment imposed by the sovereign, and whether by virtue of the particular statute imposing the penalty, or by reason of the very fact that it *is* in the nature of a punishment, may be remitted by the sovereign which imposed it. Therefore any right to the penalty prior to its actual collection from the wrongdoer must be necessarily inchoate and subject to this power or remission. Furthermore, in the only case in which this court has upheld such doctrine, the court has deemed it necessary to first determine that the particular statute imposing the penalty itself contained authority for its remission by the Government.

U. S. *vs.* Morris, 10 Wheat., 246.
Confiscation Cases, 7 Wall., 454.

But even if this rule is well founded, it has no application here, for whatever else the Law of 1907 may have been, it certainly was not a statute imposing a penalty.

So also there are cases of curative statutes held to violate no vested right though they operate retrospectively. But these are cases of mere irregularity, which might be cured by the State, and where the right claimed to be vested was inequitable in its nature and became vested, as stated by Chancellor Kent, "subject to the equity existing against them and which the statutes recognized and enforced."

Kent's Commentaries (12th ed.), vol. I, p. 517, p 456.

And, as further observed by the same eminent authority at the same place, such cases "cannot be extended beyond the circumstances on which they repose without putting in jeopardy the energy and safety of the general principles." And surely no one can seriously contend that the act of 1909

is a curative or ratification statute, or that, if it were, the rights already accrued, and which it is claimed to divest, contain any element of inequity. On the contrary, they are most just and equitable.

But the largest class of cases, and those concerning which there has been the most dispute, are those in which it has been held that the repeal or amendment of a statute giving a new or cumulative remedy defeats all actions pending at the time of the repeal. As already stated, prior to adoption of the Fourteenth Amendment this court had no concern with such State statutes except as they might involve the obligation of a contract. And in the discussion of this question expressions have been used both by courts and text writers which, when taken aside from their connection, would seem to indicate that under all circumstances the repeal of a statute necessitates the determination of pending cases as though the statute had never been passed. But no such sweeping statement will stand the test either of reason or authority. Stated briefly, the doctrine of this court on such matters is as follows:

Though the form of a statute may be remedial, yet if the rights therein given are in truth substantive the subsequent repeal or amendment of the statute will not affect rights existing under the statute.

Barnitz *vs.* Beverly, 163 U. S., 118; 41 Law Ed., 93, citing and affirming numerous former decisions.

And this same rule applies where the statute repealed declares that one shall have a right of recovery. The substantive right involved persists after the repeal.

Steamship Co. *vs.* Joliffe, 2 Wall., 450.

It is true that these are cases in which the substantive rights in question were those involved in the obligation of a contract. But if the constitutional inhibition against the violation of a contract will prevent the rule that the effect of a statute dies with its repeal from operating to divest con-

tractual rights incurred thereunder, we see no reason why the constitutional inhibition against the deprivation of property will not also prevent such rule from operating to divest property rights accrued under the statute. Underlying the holding of the State court is the assumption that rights accruing under a statute giving a new cause of action cannot be "property," for the reason that the rights so accrued are subject to be divested at will by the repeal or amendment of the statute. If this assumption were correct it would follow that neither could the provisions of a statute giving a new right of recovery constitute "contractual obligations," for the same reason that all implied statutory promises were conditional and subject to be abrogated by the repeal of the statute. But this court, by holding that a purely statutory right of recovery may constitute a contractual obligation (Steamship Co. *vs.* Joliffe, *supra*) not subject to be defeated by a subsequent amendment or repeal of the statute, has in so doing held that a right of recovery given by a statute is not given subject to be divested at legislative will. If it were it could never constitute a "contractual" obligation, and more than any other promise given expressly subject to be recalled at will would constitute a contract. To say that its repeal cannot be given a retroactive effect *because* it is contractual is to dodge the question. Before the Federal Constitution can operate there must be a "contract," and before there can be a contract there must be a promise which does not contain within itself a power of revocation. In other words, the broadly stated general rule that purely statutory rights are subject to the further legislative will does not apply to substantive rights. If it did, a promise inhering in a statute or State charter would necessarily be given subject to such right of repeal and could never constitute a valid "contractual obligation," and a State could never make a statutory "contract" for the Federal Constitution to protect.

So far as we know, this court has never directly passed

upon the question as to whether a right of recovery not penal in its nature and given by a statute constitutes "property" within the meaning of the Fourteenth Amendment. But in the Joliffe case, *supra*, such a right is held to be a "vested right," which, of course, is property. While the case is not as clear on this particular point as we could wish, special attention being given to its contractual features (a branch of this case which we take up later), yet no reason is perceived why a contractual right of recovery should be any more "vested" than any other right, needing only the pronouncing of judgment to make it effective.

In Louisiana *vs.* Mayor of New Orleans, 109 U. S., 291, it appeared that a statute gave a right to a citizen for reimbursement for damages suffered by a mob. A citizen recovered judgment under this statute, but was prevented, at least temporarily, from collecting it by a subsequent statute limiting the right of the city to raise money by taxation. The court held that the judgment was not a contract, and that "conceding that the judgment, though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that they are capable of ownership and may have a pecuniary value, the relators cannot be said to be deprived of them so long as they continue an existing liability against the city." The limitation on the taxing power did not constitute a "deprivation" of such property. He still had his judgment, which he might collect in some other way.

While this is not perhaps a *direct* holding on the point, yet if the court had not believed that the right of recovery given by the statute was "property" it would almost certainly have so held and avoided the close reasoning necessary to justify its holding that the limitation of taxing power was not a "deprivation" thereof.

Mr. Justice Bradley, in a concurring opinion, held that the question of the recompensing of a citizen in such a case was purely a matter of legislative policy and that the right might

be taken away even after the injury occurred. Mr. Justice Harlan expressed the contrary view, as follows:

> "But if this view be erroneous, it seems quite clear that the State Constitution of 1879 cannot be applied to these judgments without bringing it into conflict with that provision of the Constitution, which declares that no State shall deprive any person of property without due process of law. That these judgments are property, within the meaning of the Constitution, cannot, it seems to me, be doubted. They are none the less property because the original cause of action did not arise out of contract, in the literal meaning of that word, but rests upon a statute making municipal corporations liable for property destroyed by a mob. If a judgment giving damages for such a tort is not a contract within the meaning of the Constitution, it is, nevertheless, property, of which the owner may not be deprived without due process of law."

The case now before the court is in every way stronger than the case then being considered. The case there was for damages wrought against the will of the city and by enemies of the city; here it is for damages wrought by the city itself and its agents. It is true, the claim now before the court was not reduced to judgment when the law was changed. but in so far as its being property was concerned, such fact is immaterial. It had a "pecuniary value" and was "capable of ownership," just as the judgment in the Louisiana case. Furthermore, being based upon an injury to property, it was both assignable and would survive the death of plaintiffs in error.

Jordan *vs.* Welch, 61 Wash., 569.

Long prior to the passage of the Fourteenth Amendment, Chancellor Kent used the following pertinent language with reference to retroactive law:

> "It cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute would partake

> in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of Dash *vs.* Van Kleeck, and shown to be founded not only in English law, but on the principles of general jurisprudence. A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void."
>
> Kent's Commentaries (4th ed.), pp. 455, 514, 515.

He based such declaration upon the general principles underlying all constitutional government. This court has held that it cannot declare a State statute unconstitutional because of such general principles unsupported by a specific constitutional inhibition. But in the Fourteenth Amendment there exists such a specific provision which we respectfully ask to have enforced.

The case of Dash *vs.* Van Kleeck, 7 Johns., 477; 5 Am. Dec., 291, is directly in point on this phase of the discussion.

The New York legislature had passed a law which, as interpreted by the court, gave a creditor the right to recover from a sheriff who had let a debtor prisoner escape, even though there was a recapture prior to the commencement of the action against the sheriff. This was an entirely new right of action given the creditor, in addition to those given at common law. There was not even an imposition of new duties on the sheriff, with a right of action for their breach. It was solely and purely a statutory right of action. An action having been started under this statute, the legislature passed a new law, directing that nothing in the original statute should be so construed as to prevent the officer from availing himself, "as at common law," of a defense arising from a recapture of the prisoner. The question presented

to the court was as to the effect of the new law on the action already commenced under the original statute. The decision of the majority of the court was to the effect that the new law should not be given a retroactive effect. And the reason for this holding was very plainly stated to be that the rights under the original statute had vested, when the escape occurred with the statute in force, and therefore could not and should not be disturbed.

Thompson, J., used the following language:

> "It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take by law the property of one individual, without his consent, and give it to another. The principle contended for on the part of the defendant inevitably leads to and sanctions such a doctrine. For if the plaintiff can be deprived of his remedy already vested, with equal propriety might he be compelled to refund the money, had he actually received it."

Further along he said:

> "Giving to the act now under consideration a retrospective operation would manifestly be productive of these consequences; *for it not only takes away a vested right, but publishes and endamages the plaintiff, in the payment of costs.* If his action is defeated and his right of recovery taken away by this statute, he not only loses his own costs, but will be obliged to pay costs to the defendant."

Chancellor Kent, then Chief Justice, exhaustively reviewed both the civil and the common law as to retrospective statutes, and shows them to be universally condemned. The Chief Justice said:

> "The very essence of a new law is a rule for future cases. The construction here contended for on the part of the defendant would make the statute operate unjustly. It would make it defeat a suit already commenced *upon a right already vested.* This would be punishing an innocent party with costs, as well as

> divesting him of a right previously acquired under the existing law. Nothing could be more alarming than such a subversion of principle."

The point we wish to emphasize is that both these eminent jurists unqualifiedly held that this purely *statutory right of action* constituted a *vested right.* At that time there was no constitutional prohibition as to the violation of such rights, and to avoid such an effect they were forced to interpret *the law* so as not to give it a retroactive effect. But the right to recover, though it was purely a right of recovery based on a statute which did not even create any new duty, was held to be a vested right, a right which is now unquestionably protected by the Fourteenth Amendment.

For a second reason, however, the argument of the State court is unsound. It assumes throughout that this action is one based on a statute which merely gives a right of action. We have already,at some length endeavored to show that this is not true, but that our cause of action arises from the establishment and completion of a grade by the city without complying with the conditions of recompense imposed by the statute, and necessary to render the action legal. Plaintiffs in error are in a better position than the judgment creditor in Louisiana *vs.* Mayor, *supra,* or the plaintiff in Dash *vs.* Van Kleeck. They were suing under statutes which merely said: "You shall have a right of recovery" in certain circumstances. We are suing under a statute which says to defendants, "If you damage plaintiffs' property by this grade, without making compensation, you are committing an illegal act, and of course, shall be answerable therefor."

The case of Graham *vs.* C. M. & St. P. Ry. Co. (Wis.), 10 N. W., 609, is very instructive as to the distinction between a statute which merely gives a right of action for a penalty and a statute which prescribes certain duties and allows a recovery for a violation thereof. It appears that there was in existence in Wisconsin a certain statute fixing the rate

which the railroad company might charge, and providing that in case the company charged more the shipper might recover three times the excess of the charges. While this law was in effect the railroad company violated it by charging plaintiff more than the sums permitted. Subsequently, and before action was brought, the whole statute was repealed. Plaintiffs brought action, suing for three times the excess as permitted under the statute. The lower court refused to permit such complaint to stand, whereupon they amended, asking only for the excess, and on trial judgment was rendered for the plaintiff for such excess, together with interest. The defendant strenuously insisted that the repeal of the statute did away entirely with any right of action to recover for the excess charges. The court, while admitting that the repeal of the statute did away with the right to recover the penalty, held further that such principle did not do away with the right to recover for damages suffered by reason of a breach of a statutory duty. The charging of excess rates was a violation of the statute, for which the plaintiff might recover, even after the repeal of the statute fixing the rate.

> "As we have shown above that an act which is void by reason of the laws existing at the time it is done is not made valid by a repeal of the law, the relations of the parties and their rights arising out of such unlawful acts must remain the same after the repeal as they were before, except only as to such inchoate rights of action as are expressly given by the statute. All other rights which result from the mere existence of the statute, and do not depend for their enforcement upon its provisions, are not affected by its repeal. To illustrate, the right to recover back money unlawfully demanded and received by the railway company for charges in excess of the legal and fixed rates after the repeal of the statute, does not depend so much upon the fact that the relation of debtor and creditor had become fixed between the parties during the existence of the law, as upon the other fact that the

company acquired possession of the plaintiff's money by an act which was unlawful. The *repeal of the law does not purge the act of its unlawful character, and as the relations of the parties remain the same after as before the repeal*—the company still retains possession of the plaintiff's money unlawfully."

"Suppose a railroad company should, in violation of the existing law, run at an unlawful speed through a city, or fail to ring the bell at a public crossing, and by reason of such unlawful running or neglect to ring the bell a citizen should be run over and seriously injured, would the repeal of these statutory provisions affect the injured party's right to recover for his injuries? We think under the decisions of this court, which hold that an act which is unlawful by statute when done cannot be made lawful by a subsequent repeal of such act, such repeal could not affect the party's right of action. *Notwithstanding the repeal, the fact would remain that the act which caused the injury was unlawful, and therefore a sufficient ground for the maintenance of the action.*"

The same rule is approved in Endlich on Interpretation of Statutes, section 481, where it is said:

"Rights that have become vested under a statute cannot ordinarily be divested by a repeal of it—*so it has been held that the repeal of a statute takes away no right of action for damages which has already accrued.* * * * Thus where an act which made it unlawful for a railway company to charge higher freight rates than those prescribed in the act was repealed it was held that a party who, during the time when the act was in force, was compelled to pay higher rates and did so under protest, was not deprived by the repeal of a right of recovery therefor."

The Supreme Court of Washington, itself, decided a somewhat similar case in Miller *vs.* Union Mill Co., 45 Wash., 199. In that case the factory act of 1903, which prevented the application of the doctrine of assumption of risk where the employer failed to guard his machinery as the statute required, was repealed, after an accident to a mill employee,

but before the trial. Defendants insisted that the repealed act, so far as it related to the case, merely gave a right of action, and that, therefore, its repeal before the trial took away such right of action and left the case as though the act had never been passed. The Washington court, however, clearly distinguished between such a case and the case then before it, pointing out that the past relation and rights of the parties, as fixed by the law, was a substantive right, which could not, therefore, be modified by the subsequent repeal of the law. In the court's opinion (p. 208), it was not possible that two employees should be injured in like manner on the same day, and one recover because he succeeded in getting his case tried before the repeal of the law, while the other failed because, through no fault of his own, his case could not be heard before the repeal became effective.

We do not know how to make our position on this branch of the case any clearer. Under the best of authorities and reason, even a right of action which exists solely because a statute declares it shall come into being on certain contingencies becomes, on the happening of such contingency, a vested right, and "property," which cannot be taken away without due process of law. But, when, as in the case at bar, the right of *action* exists, not merely because the statute declares it shall exist, but because the defendants have violated a statute to our damage, then such right of action is "property" and protected by the Fourteenth Amendment.

II. THE RIGHT OF ACTION BEING "PROPERTY," THE AMENDMENT OF 1909, AS GIVEN EFFECT BY THE WASHINGTON SUPREME COURT, DEPRIVES PLAINTIFFS IN ERROR THEREOF WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT.

We do not see any necessity for arguing this statement. It is settled law, that action by the legislature is action by the State, and that an attempted wiping out of property rights by such statute, is a "deprivation without due process of law."

III. PLAINTIFFS IN ERROR HAVE A CONTRACTUAL RIGHT TO COMPENSATION GROWING OUT OF THE FACT THAT THE ORIGINAL STATUTE WAS IN FORCE AT THE TIME OF THE AUTHORIZATION AND COMPLETION OF THE GRADE.

It is elementary that where a thing can legally be done only on performance of certain conditions, and the thing is done, the law will imply a promise to fulfill the condition, though none is explicitly given. Thus if A receives B's money, to the possession of which he is lawfully entitled only if he intends to afterwards account therefor to B, the law will imply a promise on his part to render such account. And particularly would this be true where the thing done is beneficial to the person acting and the condition to be fulfilled is payment of compensation to the one injured. So if A continues in possession of B's premises after the expiration of a lease the law will not treat him as an absolute trespasser, but will imply a promise on his part to pay rent so long as he continues in possession.

Our whole system of law and our written Constitution are so zealous in guarding property rights from legislative interference that examples are necessarily rare in which legislative authority to damage or use property is given to one person on condition of making recompense to the person injured. Eminent-domain proceedings are almost the only instance. And these proceedings, and the rights of the property owners thereunder, are protected by special constitutional provisions, so that the necessity of invoking the implied promise and showing that it constitutes a contract within the protection of the Federal Constitution can rarely arise. But this is a case in which the damage originally suffered has been held by the State court to not be within the State constitutional prohibition against damaging without compensation, and where therefore we are thrown back on the Federal Constitution. And there is the best of precedent, as well as reason, for holding that where such authority to

damage on making compensation is given by statute, and the damage is done, or even where compensation is required by statute for a benefit unaccompanied by damages to the person to be recompensed, the implied promise inherent in the statute may be successfully invoked. And this principle of contractual obligation must apply, of course, whether the particular damage for which the contract of recompense is made falls within the eminent-domain clause of the State constitution or not.

On reason the matter seems very plain. We are aware of the rule that the word "contract" in the Federal Constitution does not include claims for a pure tort, even though reduced to a judgment. But this is by no means a case of a pure tort. The city *did* have authority to damage the property as it did if it had only made compensation, even after the work was done. When it did the damage it entered into an implied "compact" with the owners that it would pay for such damage.

Healy *vs.* City of New Haven, 49 Conn., 394, emphasizes this particular point of the contractual obligation. In that case it appeared that there was in effect at the time the grading was ordered and established a law authorizing recovery by the abutting property owners. Subsequently, and prior to the actual digging of the grade, the law authorizing recovery was repealed. The question was raised as to whether this repeal deprived the property owner of the right to recover. As to this the court said:

> "We think the law is so that the statute as it existed when the improvement was undertaken or entered upon must determine the rights of the parties. *The presumption is that it was undertaken in view of the statute, the parties respectively accepting the privileges which it conferred and the liabilities which it imposed.* A contrary rule might operate as a trap."

The case at bar is much stronger than the Healy case, for in this case not only was the work ordered by the City En-

ever while the law unquestionably gave a right to compensation, but the work was actually done while the law was in such condition. To hold that the change of the law affected the plaintiff's rights would be, indeed, as the Connecticut court said, to make it operate as a trap and to violate the implied contract under which it was performed.

And the contractual obligation arising from such an implied contract is protected by the Federal Constitution.

Steamship Co. *vs.* Joliffe, 2 Wall., 450; 17 Law Ed., 805, involved this point. California had passed a statute requiring the payment of half pilotage fees to any pilot who hailed a vessel in San Francisco harbor and whose services were declined. Pending an action by a pilot, based on this law, the statute was repealed, and the same claim was made there that is made here that, the action being statutory, it fell with the repeal of the statute. As to such contention this court said:

> "If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. *The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention, which is an essential ingredient of an actual contract, is often wanting.* Thus, if a party obtain the money of another by mistake, it is his duty to refund it, not from any agreement on his part but from the general obligation to do justice which rests upon all persons. In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one; and the liability thus arising is said to be a liability upon an implied contract." * * *

> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

And distinction which can be drawn between that case and the case at bar is in favor of the present case; for if the obligation of an implied statutory contract, forced by the statute upon one who receives no actual benefit from it, will be protected by the Federal Constitution and become a vested right, how much more will the implied obligation of a statutory contract, voluntarily assumed, be protected for the benefit of the owner whose property, without his consent, has been actually damaged thereunder. The Healy case shows that there *was* an implied contract. The Joliffe case shows that such a contract is within the *protection* of the Federal Constitution. And both cases are founded on sound reason.

We respectfully submit, therefore, that the repeal of the law of 1907 could not affect the right of recovery in this action as to give the law an effect which not only deprives plaintiffs in error of their property and vested rights, but also violates the obligation of the contract entered into when the work was ordered and the damage actually done by the city and its agent in the construction of the grade.

IV. THE REPEAL OF LAWS OF WASHINGTON, 1907, CHAPTER 153, SECTION 48, NOT BEING SUFFICIENT UNDER THE FEDERAL CONSTITUTION TO DIVEST THE RIGHT OF RECOVERY, THIS CASE MUST BE REVERSED.

This case differs from its companion case of Ettor *vs.* City of Tacoma *et al.*, now before this court on writ of error, in that the property and street here in question were a part of the city of Tacoma long before the County Board passed its order vacating "M" and "N" streets on the con-

dition that the railway company should grade 26th street. Therefore, its order, though in terms including the grading of the portion of the street here in question, had no more effect thereon than so much waste paper. Therefore we need not here repeat the argument of the Ettor case on this point. And the record showing no other possible ground on which the demurrer could have been sustained, if the law of 1907 had been applied, a holding by this court that the repeal of the law of 1907 cannot operate retrospectively necessitates a reversal of the case.

V. THE STATUTE OF 1907 BEING APPLICABLE, BOTH OF THE DEFENDANTS IN ERROR ARE RESPONSIBLE TO PLAINTIFFS IN ERROR FOR THE DAMAGE SUFFERED.

The holding of the State court, affirming the judgment as to the railway company, necessarily involves a holding that its act in grading the street was authorized, either by the city or by the prior action of the board. If it was not authorized at all, the court would have necessarily found the railway company liable for the unauthorized damage which it wrought. We have already discussed the theory that the action was authorized by the prior action of the board, and found it to be ill founded. It must, therefore, be conceded that the acts of the railway company were authorized by the city. It follows that the grading was the act of the city, by its agent, the railway company, and that the city is liable if, as we have shown to be the fact, the act of 1907 applied.

Is the railway company also responsible under such circumstances? We contend that it is, and for two reasons:

First. The act authorized by the city was, itself, in view of the refusal to carry out the provisons of the act of 1907. an illegal act, for which the agent as well as the principal is liable. The cases where contractors, as the railway company is here, have by direction or authority of the city done illegal acts in the streets are generally against the city alone.

But in reason, it would seem, that the contractor should also be liable. The fact that one has been ordered to do a wrong, or has contracted to do it, does not excuse the wrong.

Hatch *vs.* Olympia, etc., Ry. Co., 6 Wash., 7, is directly in point. In that case the statute provided that the city might authorize the laying of railway tracks in a city, but no railroad track should be there laid until the injury was compensated and paid for. The court held that even though an ordinance was passed authorizing such use of the streets, still the railway company would be liable. In its discussion the court used the following language:

> "The city, under its charter, had not itself the right to change the grade of streets without paying the damages resulting therefrom to owners of abutting property who had made improvements thereon with reference to the established grade, and therefore could not legally authorize the railroad company to do so."

Second. While the prior action of the board did not authorize the grading and damage without subsequent action by the city, yet the record shows that the city, in making the railway company its agent for the construction of the grade and in vacating the streets referred to in the order, adopted as its own the original proceedings, except as necessarily modified by the laws and statutes governing the grading of streets by cities of its class. When the city, by its engineer, ordered the work to be done in a certain manner and vacated "M" and "N" streets, and the railway company accepted such vacation and built the grade as directed by the city, they impliedly agreed that their rights and liabilities the one to the other should be as set out in the order of the board. One of these provisions was that the grading of the street should be at the railway company's "own expense, and without cost or charges to or upon the said county of Pierce." Under the statute governing the city, which by the mutual acceptance of the parties succeeded in the con-

tract to the county of Pierce, a part of this expense so contracted to be paid was payment of compensation to the property owners. The railway company has, therefore, by proceeding as though the original order of vacation were a contract between itself and the city, agreed to pay plaintiffs in error for the injury which they would sustain. The promise was obviously not only for the benefit of the city, but for the benefit of the property owners, and they may rely upon it in an action to recover such damages. This is not only the universal rule in the United States, but is made positive by the provisions of the Washington Code, that "Every action shall be prosecuted in the name of the real party in interest," except as otherwise specially provided.

Remington & Ballinger's Code of Washington, sec. 179.

Conclusion.

It therefore appears that the repeal of the act of 1907 could not affect the right of recovery in this action; that under such act the right of recovery existed, and that each of the defendants in error is liable in this action for such recovery. We therefore respectfully ask that the judgment of the State Supreme Court be reversed, and that the case be remanded for further proceedings in accordance with the law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

EDWIN HOWARD, EMMA HOWARD,
Plaintiffs in Error,

vs.

CITY OF TACOMA *et al.*,
Defendants in Error.

No. 69.

BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF FACTS.

There is but one question to be presented for the consideration of this Court, viz.:

DID THE SUPREME COURT OF WASHINGTON ERR IN HOLDING THAT NO SUBSTAN-

TIAL RIGHT OF PLAINTIFFS IN ERROR, UNDER THE CONSTITUTION OF THE UNITED STATES, HAD BEEN VIOLATED BY THE ACT OF THE LEGISLATURE OF THAT STATE IN 1909 (Laws of 1909, p. 151, Rem. & Bal. Code, Sec. 7815), amending Section 48, of Chapter 153, of the Laws of 1907?

The State of Washington, through the decision of its court of last resort, adheres to the doctrine that the dedication of land to public use for a street, as by a plat, constitutes an agreement on the part of the dedicator that the public may thereafter do what is necessary in the way of grading or filling to make a passable street, without liability to abutting land owners for consequential damages.

Fletcher v. Seattle, 43 Wash. 627;

Ettor v. Tacoma, 57 Wash. 50.

In taking that position it followed the principles announced by this Court in

Smith v. Corporation of Washington, 20 Howard 135;

Sauer v. New York, 206 U. S. 536.

So deciding, the Washington court in this case held that because there had been no right of action until the statute created it, the repeal of the creative statute defeated the pending action.

Plaintiff in error, admitting that his right of action was founded upon the statute alone, disputes

that position, and claims that his right of action could not be taken away once it had accrued.

Jefferson Branch Bank v. Skelly, 66 U. S. 431, cited by plaintiffs, could only become applicable when it should be held that the 47th section of the Act of 1893 made a contract between the state of Washington and all land holders and lot owners (which should be irrevocable) that no street grade could be made in front of their property without the payment of consequential damages.

The same remarks apply to *Bridge Proprs. v. Hoboken S. & I. Co.*, 68 U. S. 116; *Chicago B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, and *Douglas v. Kentucky*, 168 U. S. 488.

But plaintiff does not attempt to claim or show that the statute made a contract between the state and the land or lot owner; his point III. merely endeavors to argue that because of the statute the City's liability for damages carried with it a contractual obligation that it would pay damages, if any, whenever it graded a street; which is a very different proposition.

It cannot be successfully contended that the liability of the City while the statute existed was in any sense contractual.

It is for defendants in error to support the decision of the court below, and inasmuch as the two opinions of the Supreme Court of Washington so

completely and effectually cover every proposition at issue here, this brief will be found to be a close imitation of those opinions, with only such verbal departures as the circumstances make necessary.

The right claimed to have been taken away was wholly statutory.

But the repeal of a statute creating a right of action, without a saving clause, takes away all right to proceed, and the repealed act is considered as if it had never existed except for the purpose of those actions or suits which have been prosecuted and concluded while it was an existing law. This is axiomatic, so that it is held that a repeal after decision, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to a higher court charges the appellate court with the duty of declaring the litigation ended without right of further prosecution.

"This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may, therefore, reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by absolute repeal."

Vance v. Rankin, 194 Ill. 625.

"It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the re-

peal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after."

South Carolina v. Gaillaud, 101 U. S. 433.

See in support of this rule:

Cooley, Const. Lim (7 Ed.) 544;

2 Sutherland Stat. Const. (2 Ed.) 285;

Endlich, Interp. of Stat., Par. 478, 479, 480;

22 Am. & Eng. Ency. of Law, 745, 752;

Hampton v. Commonwealth, 19 Pa. St. 329;

Sumner v. Cummings, 23 Vt. 427;

Taylor v. Strayer, 78 N. E. (Ind.) 236;

Andig v. Levi, 57 Miss. 58;

Riley v. City, 92 N. W. (Ia.) 887;

Century Digest Title "Statutes," Vol. 44, Col. 2975;

Cope v. Hampton County, 19 S. E. 1018.

Plaintiffs' citation of *Muhlker v. Railroad Co.*, 197 U. S. 544; *Steamship Co. v. Joliffe*, 2 Wall 450, and *Sauer v. New York*, 206 U. S. 536, is not persuasive. To make them of any force it must be assumed that the action for damages would have lain although there had never been a statute giving compensation for consequential injury resulting from an original grade, and that Chapter 80 of the Laws of Washington of 1909 was void if it could be given a retrospective effect.

The Muhlker case grew out of a condition theretofore unknown to the courts of this country. It had been held by the Supreme Court of New York

that light and air coming from a street could not be taken from the adjacent property owner without compensation by an elevated railroad company. Subsequently one Muhlker acquired certain property fronting on a street over which the track of the railway was constructed. It was laid on or below the grade of the street, but by an act of the legislature the company was authorized to change it to an elevated road. The company claimed immunity from damages under its original grant of a right of way and the subsequent act of the legislature. The state court held with the company. That judgment was reversed by this Court.

Cases which will perhaps be cited by plaintiffs are the following, which will not, however, support its appeal to this Court:

A common law right of action which has become vested is, of course, not affected by legislative action, especially where the foundation of the right is a fraud or fraudulent practice, as in *Angle v. Chicago & Co.*, 151 U. S. 65. It was not even claimed in that case that the action of the legislature had affected Angle's right of action.

In *Westerfelt v. Gregg*, 12 N. Y. 211, the husband's rights did not depend upon any statute, but upon the laws governing the rights of married persons as administered by the courts of New York.

In *Stevens v. Marshall*, 3 Pinney (Wis.) 203, the mill owner could not, at common law, flood the lands

of the other proprietor without being liable for damages, and to an injunction as well. He was bound to pay damages in either case, but, under the statute, he had practically the right of eminent domain; that is, he could, by paying enough damages, have the perpetual right of flowage.

Nor does the *City of Elgin v. Eaton*, 83 Ill. 535, furnish anything better, for the City had taken Eaton's land by entering upon it, and it was proposing to keep the land without paying for it, which it could not do without either statute or constitutional provisions.

In *Graham v. C., M. & St. P. Ry. Co.*, 10 N. W. 609 (Wis.), the court said:

"This court has held that a right of action, whether civil, penal or criminal, expressly given by statute, is destroyed by its repeal, unless there be a saving clause in the repealing statute which preserves the right to the plaintiff. The repeal destroys all such rights of action, whether commenced and pending at the time for repeal or not"—citing fourteen cases from Wisconsin reports.

The statute in that case prohibited a charge from Muscoda to Milwaukee of more than 19 cents per 100 pounds on grain, and allowed a recovery of three times any excess charged. The company charged 25 cents, and the suit was commenced to recover three times the 6 cents excess. The legislature repealed the triple damage provision, but the rate limit stood, and a recovery for 6 cents was sustained be-

cause of the wrong which had been done by exacting an unlawful rate.

In none of these cases was the right of a city to make an original grade of its streets involved, nor was the right of the legislature to abridge or abrogate a right given by statute considered or questioned.

In *Steamship Co. v. Joliffe* a claim arose under the pilotage law of California. After a right of action had accrued, the statute upon which it was founded was repealed. The court said:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

This is the undoubted rule as between individuals when rights have accrued under contract or quasi contract, but it has never been extended so as to preserve a right of action against the public when the right is not based upon contract, but is asserted because it accrued at a time when the right of sovereignty was temporarily surrendered. A case involving the same principle was before the Supreme Court of Oregon.

Ladd v. City of Portland, 32 Ore. 271.

Under an original charter a city was authorized to improve streets at the expense of abutting property owners, but it was provided that when a street

"has become improved under and by virtue of the provisions of this chapter, thereafter such street or part thereof shall not be subject to be again improved, but may be repaired." Thereafter the city was consolidated with others, and a new charter was passed, "all vested rights being reserved." Thereafter the council proceeded to, and did, improve the street and assessed the cost to the abutting property. An action was brought to restrain the collection of the tax, the contract clause of the federal constitution being invoked. The court held:

"The Supreme Court of the United States, in interpreting the clause of the constitution now under consideration, has always taken the terms thereof in their ordinary meaning, and holds that the word 'contract,' as used therein, means a voluntary agreement of minds upon a certain consideration, to do or not to do certain things: *Murray v. Charleston*, 96 U. S. 432; *Louisiana v. Mayor etc. of New Orleans*, 109 U. S. 285 (3 Sup. Ct. 211); *Fisk v. Jefferson Police Jury*, 116 U. S. 131 (6 Sup. Ct. 329). And in our opinion the legislation in question has none of the essential ingredients of such a contract. The power to assess the costs of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations; but it is 'never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms': *Philadelphia Railroad Company v. Maryland*, 51 U. S. (10 How. 394). And even then, if the exemption is not supported by some consideration it may be revoked at any time: *Rector etc. of Christ Church v. County of Philadelphia*, 65 U. S. (24 How.) 300. * * * The manifest purpose of the provision of the charter

under consideration was to define the mode and extent of the power of the council in the matter of street improvements, and the limitation on the exercise of such power was a mere concession to the citizen, and an act of grace, and not a contract by which the state forever relinquishes the sovereign power of taxation. It was a limitation voluntarily imposed by the legislature upon the powers of the city, which that department of the state government could remove at any time public policy or the interests of the municipality might seem to demand, and bound the state only so long as the statute remained unrepealed."

The sum of the matter is this:

This Court held in *Smith v. Washington, supra,* that no action would lie for consequential damage to abutting land caused by the grading of a street in front of it.

The constitution of Washington, Article I., Section 16, prohibits the taking or damaging of property without compensation.

The Supreme Court of Washington declared that when land was dedicated for a street there was an implied contract that the street might be graded either up or down, as the nature of the surface required; and that such a grade was not a "damaging" of abutting property within the meaning of the constitution. The legislature, by a most palpable mistake, hidden away in a long act upon the subject of eminent domain by cities, nevertheless conferred a right of action for such damages.

With the exception of the Fletcher case (43 Wash.

627), these are the only cases which have arisen in the state under the statute. The Fletcher case was a discovery not made until a petition for rehearing was filed. As soon as the attention of the legislature was called to the evident blunder its predecessor had made, it repealed the statute, with an emergency clause putting the repeal in effect at once.

Under all authority and upon the best reason it is submitted that the case should be affirmed.

Respectfully,

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Of Counsel.

ETTOR *v.* CITY OF TACOMA.

HOWARD *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Nos. 68, 69. Argued December 6, 1912.—Decided April 7, 1913.

In the absence of legislation requiring compensation to be made for damages to abutting owners by change of grade of street, the municipality, being an agent of the State and exercising a governmental power, is not liable for consequential injuries provided it keep within the street and use reasonable care and skill in doing the work.

Under the statutes of the State of Washington as construed by the courts of that State this general rule was superseded by legislation which required municipalities to compensate for consequential damages.

A municipality cannot defend a suit for consequential damages on the ground that as the agent of the State it is immune, when its only authority to act is that given by the State coupled with an obligation to make compensation.

A state statute giving compensation for consequential damages caused by

change of grades of streets does not merely provide a remedy but creates a property right; to repeal such a statute so as to affect rights actually obtained thereunder is a deprivation of property without due process of law as guaranteed by the Fourteenth Amendment.

The statute of Washington repealing the former statute which gave a right to consequential damages from change of grade, as construed by the state courts as destroying rights to compensation which had accrued while the earlier act was in effect, amounts to a deprivation of property without due process of law.

Where no private rights have vested, a statute giving benefits under certain conditions may be repealed without violating the contract or due process provisions of the Federal Constitution, but the case is different when the right to compensation has actually accrued. *Salt Co.* v. *East Saginaw*, 13 Wall. 373, and *Wisconsin &c. Railway* v. *Powers*, 191 U. S. 375, distinguished.

57 Washington, 50, 698 reversed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Washington in regard to damages for changing grade of streets, are stated in the opinion.

Mr. Stanton Warburton, with whom *Mr. John M. Boyle*, *Mr. E. B. Brockway* and *Mr. C. M. Boyle* were on the brief, for plaintiffs in error.

Mr. Heman H. Field, with whom *Mr. George W. Korte* and *Mr. T. L. Stiles* were on the brief, for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

These were actions to recover for damage inflicted upon abutting property in consequence of an original street grading done by the railroad company under authority and direction of the city of Tacoma.

At the time the grading was done there was in force an act of the Washington legislature which required the city

to make compensation for consequential damages due to an original street grading. Pending these suits and while they were actually being heard, the provision of the act referred to which expressly required the city to provide for or make compensation for all such damage, was amended so as to provide that the act should not apply to the original grading of any street. Laws of Washington, 1907, c. 153, p. 316, and Laws of 1909, c. 80, p. 151. When the attention of the trial court was called to this repealing act, it directed a verdict for the city upon the theory that the right of action was statutory and fell with the statute, there being no saving clause. This judgment, upon the same ground, was affirmed by the Supreme Court of the State.

For the plaintiffs in error the contention shortly stated is, that the act of 1907 was the sole legislative authority of the city for making the cuts and fills in front of their premises upon the public street, and that that act expressly required the city to make provision for compensating an owner so damaged; and that their right to such compensation having accrued while the act was in force cannot be destroyed by subsequent legislation without a violation of the rights guaranteed by the Fourteenth Amendment.

In the absence of legislation requiring compensation for such damage the general rule of law is that a municipality in making, grading and improving streets is the agent of the State, exercising in the performance of such work a governmental power, and is not liable for consequential injuries to property abutting, if it keep within the street and use reasonable care and skill in doing the work. 4 Dillon Municipal Corporations, 5th ed., §§ 1674, 1677; *Smith* v. *Corporation of Washington*, 20 How. 135; *Transportation Co.* v. *Chicago*, 99 U. S. 635, 641; *Humes* v. *Knoxville*, 1 Humph. (Tenn.) 403. This was the general law as announced by the Supreme Court of Washington in its first opinion in the case of *Fletcher* v. *City of Seattle*,

43 Washington, 627, and is the general law of the State as announced by the court's opinion in the instant case. Where the benefits equalled the injury, there was, of course, no injustice in the application of the general rule. But where the damage exceeded the benefits there was an apparent injustice in casting upon such an owner an undue share of the cost of an improvement for the public benefit. This was recognized in *Transportation Co.* v. *Chicago, supra,* where municipal non-liability was said to be due to the fact that in improving its highways the municipality was but the agent of the State, and that as the State could not be sued, its agents were equally immune for improvements authorized by the law of the State, without the consent of the State. But this equity which exists when the benefits are less than the damage affords a strong foundation for legislation requiring compensation in such circumstances. This consideration doubtless led to the legislation of the State requiring compensation for such damage, under which the rights of the plaintiffs in error are asserted.

Whatever may have been the authority of the City of Tacoma under its charter or the general law of the State to take or damage property for the purpose of opening, making, improving or grading its public streets, and its immunity from liability for consequential damages in making an original grading, prior to the legislation found in the two acts of 1893 and 1907, Laws of Washington, 1893, c. 84, p. 189, and Laws of 1907, p. 316, it is plain that the acts in question cover the whole subject of its authority and its liability for taking private property or "damaging" it, in either making, grading or regrading its public streets. The two acts referred to are identical in every essential. The latter is a mere reënactment of the first, by which its provisions are extended to a larger class of municipal corporations.

The act of 1893 was construed and applied by the

Supreme Court of the State in *Fletcher* v. *Seattle*, 43 Washington, 627. The action was by the owner of premises which had sustained damage while the act was in force, in consequence of an original grading. He recovered a judgment, which, upon a first hearing, was reversed by the Supreme Court, that court holding that consequential damages arising from an original grading when the work had been done with due care, was neither a taking nor a damaging of private property within the meaning of the constitution of the State requiring compensation for taking or damaging private property for public purposes. But, upon a rehearing, the attention of the court was for the first time called to the act of 1893, and the contention advanced that the only authority of the city to take or damage the property of the plaintiff for the purpose of grading the street was under that act, and that, by its terms, the city was required to make compensation for damage arising from an original grading. The construction of that act upon facts like those in the present case was thereby directly involved. It was urged that the forty-seventh section did not require compensation for consequential damages, but in answer to this, the court said (p. 633):

"We think the word 'damages' used in the section (the 47th) has the same significance and meaning that it has in other sections of the same act, and that it was used in its broad sense and includes consequential damages. We see no reason why this provision of the law should be segregated from the other provisions, and a different construction placed upon it, or why the provisions of the act in relation to the assessment of the damages should not apply to it as it does to the other sections, and if it does the right of compensation is equally granted.

"It was said that the title of the act shows that it is legislation concerning the exercise of the right of eminent domain but we think the title is sufficient to cover the

section objected to equally as well as the other sections in the act, and it was evidently the intention of the legislature to pass an act covering the whole subject of opening streets, and of providing methods of making compensation for damages where damages followed. The title not only provides for the exercise of the right of eminent domain, but, also, the taking and damaging of land and property for public purposes, and section 1 of the act empowers the city to condemn and also empowers it to *damage* any land or other property for the purpose of opening streets. Section 2 says, when the corporation authorities of any such city shall desire to condemn land or other property *or damage the same* for any purpose authorized by this act such city shall provide, etc. In this case the city had the power to damage respondents' land, and it was found that it did damage it and it damaged it in a way that it was authorized by § 47 of this act; namely, by establishing a grade on the street upon which their property abutted. And this idea is manifested throughout the act. That the section does not contemplate such damages as are caused by an encroachment or actual trespass upon the lands of the owner, as is suggested by the appellant, is manifest from the language of the section itself which evidently contemplates that the work will be upon the street and not upon the abutting property.

"We are unable to find any more ambiguity in this section than in any other provision of the act, and under its provisions the plaintiffs are entitled to such damages as they can show they have suffered. The question of public policy and expense to the city are questions which are purely legislative."

The judgment of the lower court was thereupon affirmed.

The opinion so construing the act of 1893 was filed in September, 1906. In March, 1907, the act of 1893, then in force, was extended to a larger class of cities and re-

enacted, without any change in any material respect, the first, second and forty-seventh sections being reënacted, the forty-seventh section becoming in the later act § 48. While this act of 1907 was in force, the city directed the grading in question and made or caused the railroad company to make cuts and fills in the street in front of the premises of the plaintiffs in error which resulted in large injury to their property. The city did not provide for compensation for the damage so done by any special assessment upon the property benefited. This brought into effect the provision of the second section requiring the payment of such damage to be made out of the general funds of the city. Payment not having been made as required, the plaintiffs in error brought these actions to recover compensation.

The defense of the city that it was but the agent of the State in improving the highways of the city, and therefore immune, because the State was immune, vanishes in the face of the fact that the State had absolutely coupled authority in the matter with an obligation to make compensation. The city had no authority save that which came from the very act which imposed an obligation. It would seem to need no argument to establish the contention that the obligation to make compensation to these plaintiffs in error could not be destroyed by subsequent legislation.

Neither of the acts provided any remedy for the enforcement of the obligation to make compensation. Both provided that the city might by ordinance arrange for the ascertainment of the damages, and for their collection by special assessment on the property benefited, or within a special assessment district. But the plain requirement of the first and second sections of both acts is that if the city does not so provide for special assessments, that it should make the compensation out of its general treasury. The repealing clause of the act of 1909 does not touch the

general features of the law beyond the provision that the forty-eighth section of the act, which extended the obligation of compensation to original gradings, should not apply to damage arising from such gradings. It is a mistake to say that the act of 1907 gave a remedy where none existed before. What it did was to impose an obligation to compensate abutters injured by an original grading, an obligation which, however meritorious, had no sanction in positive law. The remedy, if the city disregarded the obligation, was that afforded by the common law for the breach of any valid contractual or statutory duty. That was the remedy which was enforced by the Washington court in *Fletcher* v. *City of Seattle, supra.*

Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. That the state court has treated the act of 1907 as merely giving a remedy where none existed before, and the act of 1909 as merely repealing the remedy so given, is plain.

The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation

to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation. *City of Elgin* v. *Eaton*, 83 Illinois, 535; *Healey* v. *City of New Haven*, 49 Connecticut, 394; *Harrington* v. *Berkshire*, 22 Pick. (Mass.) 263; *People* v. *Supervisors*, 4 Barb. (N. Y.) 64, are cases arising under street or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law: *Steamship Company* v. *Joliffe*, 2 Wall. 450; *Miller* v. *Union Mills*, 45 Washington, 199; *Grey* v. *Mobile Trade Co.*, 55 Alabama, 387; *Stephens* v. *Marshall*, 3 Pinney (Wis.), 203; *Gorman* v. *McArdle*, 74 S. C. Rep. (N. Y.) 484; *Westervelt* v. *Gregg*, 12 N. Y. 202; *Creighton* v. *Pragg*, 21 California, 115; *State Trust Company* v. *Railroad Company*, 115 Fed. Rep. 367.

Certain cases have been cited in support of the action of the state court, among them *Yeaton* v. *United States*, 5 Cranch, 281. But that was a case of a forfeiture to the United States. The repeal of the statute was held to end the proceeding, although a sentence had been pronounced and was pending upon appeal when the act under which it had been entered was repealed. No private right had

vested, and the Government could abandon its own proceeding if it saw fit at any stage. Another case cited is *Salt Company* v. *East Saginaw*, 13 Wall. 373. For the purpose of encouraging the manufacture of salt the State of Michigan, by a general statute addressed to no particular person or corporation, offered a bounty upon salt produced and exempted from taxation the property engaged in the business. After a time the act was repealed. The claim was that the exemption constituted a contract, and that it could not be repealed without impairing the obligation of the contract. But this court said that the exemption did not constitute a contract and was nothing more nor less than a law dictated by public policy for the encouragement of an industry. So long as the law was in force the State promised the exemption and bounty, but there was no pledge that it should not be repealed at any time. In *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379, 385, 387, the case was said to point out the distinction between "an exemption in a special charter and general encouragement to all persons to engage in a certain enterprise," and the same principle was applied to an act which provided an exemption to any corporation building a line of railroad north of certain lines of latitude. The court held that it was addressed to no one in particular and constituted a mere announcement of policy not constituting a contract, and was therefore subject to repeal at any time. The case of *Louisiana* v. *New Orleans*, 109 U. S. 285, has been cited. That case merely held that a judgment against the city under a statute for damage to private property inflicted by a mob did not constitute a contract, the obligation of which had been impaired by the repeal of a statute under which the city might have been compelled to levy a special tax for its satisfaction. The case turned upon the distinction between liability for a tort and liability under a contract.

In the instant case the action is neither for a tort, nor

for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded which required compensation to be made. The right to compensation was a vested property right.

The judgments must be reversed and the cases remanded for further proceedings not inconsistent with this opinion.
